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No. ____

IN THE

Supreme Court of the United States

The Programmers Guild, Inc.; American Engineering Association, Inc.; Bright Future Jobs; Michael Amanti; Mark Blackburn; Toni L. Chester; David Huber; John G. Marson; Harrison Picot, II; Paul E. Polak; Mike Rothschild; Robert Sanchez; Stephen Berry; and Stephanie M. Berry,

Petitioners,

v.

Janet Napolitano and United States Department of Homeland Security,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION FOR A WRIT OF CERTIORARI

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November 13, 2009

QUESTION PRESENTED

Foreign students are admitted to the United States under the "F-1" visa program "solely for the purpose of pursuing ... a course of study." 8 U.S.C. § 1101(a)(15)(F)(i). In 1991, the Immigration and Naturalization Service issued regulations permitting "Optional Practical Training" ("OPT") employment by foreign students under terms intended to "avoid adversely affecting the domestic labor market." 56 Fed. Reg. 55,610 (Oct. 29, 1991).

In 2008, after Congress had rejected similar measures to expand the OPT program, the Department of Homeland Security issued an Interim Final Regulation which changes the OPT program so an estimated 40,000 alien science, technology, engineering and mathematics ("STEM") graduates can remain in the United States for up to 29 months as "foreign students" while seeking employment. 73 Fed. Reg. 18,944 (April 8, 2008). The U.S. Court of Appeals for the Third Circuit held that American STEM workers do not have standing to challenge the regulation because they are not within the zone of interests of the foreign student visa provision.

The Question Presented is as follows:

Whether American science, technology, engineering and mathematics workers can challenge changes to U.S. Department of Homeland Security regulations which allow aliens in those fields to work in the United States for an extended period of time after graduation as "foreign students."

PARTIES TO THE PROCEEDINGS BELOW

All parties are named in the caption above. Petitioners who were plaintiffs/appellants below are: The Programmers Guild, Inc.; American Engineering Association, Inc.; Bright Future Jobs; Michael Amanti; Mark Blackburn; Toni L. Chester; David Huber; John G. Marson; Harrison Picot, II; Paul E. Polak; Mike Rothschild; Robert Sanchez; Stephen Berry; and Stephanie M. Berry.

Respondents who were defendants/appellees below are: Janet Napolitano (who replaced Michael Chertoff), Secretary of Homeland Security, and the United States Department of Homeland Security.

The organizational Petitioners are nonprofit corporations without stock and there are no parent corporations or publicly-held corporations which own stock in any of the Petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners are American science, technology, engineering, and mathematics workers who respectfully request that this Court issue a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Third Circuit denying them an opportunity to challenge the regulations issued by Respondents.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey, filed on Oct. 31, 2008, is unreported and reproduced below as Appendix B. The opinion of the United States Court of Appeals for the Third Circuit, filed on July 17, 2009, is unreported, *available at* 2009 WL 2096292 (July 17, 2009), and reproduced below as Appendix A. The Third Circuit's Order denying rehearing and rehearing *en banc* is unpublished and is reproduced below as Appendix C.

BASIS FOR JURISDICTION

A judgment of the court of appeals was entered on July 17, 2009. A petition for rehearing was denied on August 17, 2009. Jurisdiction was invoked in the district court under 8 U.S.C. §§ 1331, 1346 and 1361, and 5 U.S.C. § 706(2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS AT ISSUE

8 U.S.C. § 1101(a)(15)(F)(i) (2009). Definitions

(a) As used in this chapter—

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

(F)(i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184(l) of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn.

Relevant portions of the regulations at issue in this case, 8 C.F.R. § 214.2(f), are reproduced as Appendix E.

The Interim Final Notice at issue in this case, 8 C.F.R. §§ 214, 274a (Extending Period of Optional Practical Training by 17-Months for F-1 nonimmigrant Students with STEM (Science, Technology, Mathematics, and Engineering) Degrees and Expanding Cap Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944–56 (April 8, 2008)), is reproduced as Appendix F.

INTRODUCTION

This case involves two of the principal ways in which aliens can seek temporary employment in the United States in science, technology, engineering or mathematics (collectively known as "STEM" fields). "Foreign students" with "F-1" visas[1] can apply for an administratively-created[2] "Optional Practical Training" ("OPT") program which allows them to work to "further their educational objectives" and "prepare for careers in their home countries."[3]

In 1990, Congress created[4] a visa category, known as "H-1B,"[5] which allows aliens in "specialty occupations" to work in the United States for up to six years. Many thousands of F-1 foreign students, especially in STEM fields, seek H-1B visas each year to remain in the U.S.[6]

Congress limits the number of H-1B visas available each year.[7] In some years, the H-1B program receives many more applications than the number of available visas, and applicants have their applications denied or delayed.[8] This is not true in the current Fiscal Year. Miriam Jordan, *Slump Sinks Visa Program*, The Wall Street Journal, Oct. 30, 2009 ("thousands of spots unfilled for the first time since 2003").

Some American employers proposed an increase in the H-1B annual visa availability limit and an expan-

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[1] 8 U.S.C. § 1101(a)(15)(F)(i) (2009).

[2] 8 C.F.R. § 214.2(f)(10)(ii)(A)(ii) (2009).

[3] 56 Fed. Reg. 55,611 (Oct. 29, 1991).

[4] Immigration and Nationality Act of 1990, Pub. L. 101-649, § 205, 104 Stat. 4978.

[5] 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2009).

[6] App. 51a; 73 Fed. Reg. 18,946.

[7] 8 U.S.C. § 1184(g) (2009).

[8] App. 52a–53a; 73 Fed. Reg. 18,946.

sion of the OPT program to allow foreign students to work for up to 24 months after graduation.[9] Despite four opportunities to do so in 2006 and 2007, Congress did not enact either change.[10]

In April, 2008, the Respondents—expressly citing employer requests, Congressional inaction and the need to address the then-over-subscribed H-1B quota[11]—administratively expanded the OPT program to provide a 29-month work period to STEM graduates and authorization to remain in the U.S. while unemployed.[12] The expansion of OPT ignored any F-1 visa category requirements that the "foreign students" be "bona fide students" in the United States "solely" to pursue a "course of study,"[13] and Respondents' own prior regulatory requirements that OPT employment be to "further their educational objectives" and to prepare for "careers in their home countries."[14]

This expansion created, by regulation, a new visa category for foreign student STEM graduates, who have up to 29 months to seek employment or work

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[9] Statement of William H. Gates, Chairman, Microsoft Corporation, before the U.S. Senate Committee on Health, Education, Labor & Pensions, March 7, 2007 ("Statement of Bill Gates"), *available at* http://help.senate.gov/Hearings/2007_03_07/Gates.pdf.

[10] *See* Comprehensive Immigration Reform Act of 2007, S. 1348 (110th Congress), § 507, 153 Cong. Rec. S7,271–313, S7,279 (daily ed. June 7, 2007); *Id.*, 153 Cong. Rec. at S7,313; Comprehensive Immigration Reform Act of 2007, S. 1639 (110th Congress), § 418, 153 Cong. Rec. S8,641-51 (daily ed. June 28, 2007); Comprehensive Immigration Reform Act of 2006, S. 2611 (109th Congress) § 507, 152 Cong. Rec. S5,135-91 (daily ed. May 25, 2006).

[11] App. 52a; 73 Fed. Reg. 18,946.

[12] App. F; 73 Fed. Reg. 18,944–56.

[13] 8 U.S.C. § 1101(a)(15)(F)(i) (2009).

[14] 56 Fed. Reg. 55,610–11.

visas to remain in the United States.[15] The new category is expressly intended to bridge the "gap" between F-1 foreign student and H-1B foreign worker programs by keeping "students" "in place doing productive work while they are awaiting the work visa process."[16] There is no express statutory authorization for this new "bridge" visa program.

This case asks whether, after Congress refuses to do so, a federal agency may reverse long-standing federal policy on foreign students' employment to permit an estimated 40,000 aliens who have completed their STEM education to remain in the United States as "foreign students" so that they can compete for jobs against American STEM workers. This Petition asks whether American STEM workers have standing to challenge the expanded OPT regulations and the 29-month-long "bridge" between foreign student and alien worker statuses. The courts below dismissed this challenge because they felt that the American STEM workers were not within the "zone of interests" of the immigration laws, as evidenced by the fact that the F-1 visa provision does not include express American worker protection language.

The Third Circuit's holdings below conflict with those of this Court and other Circuits. The Third Circuit held that Congress was not "concerned" about protecting American workers in the foreign student visa provisions, even though Congress, Respondents and other Circuits have long recognized that foreign

[15] App. 60a; 73 Fed. Reg. 18,948.

[16] U.S. Dept. of Homeland Security, Press Relese, Remarks by Homeland Security Secretary Michael Chertoff and Department of Commerce Secretary Gutierrez at the State of Immigration Address (June 9, 2008) ("Chertoff Remarks"), *reprinted* in App. H. at App. 114a.

students' employment should be primarily tied to their educational programs and should not affect the American labor market. In addition, the Third Circuit held that worker protections must be explicit in the immigration law, which conflicts with decades of law recognizing that American workers can challenge the admission of foreign workers. The decision below weakens the protections Congress intended in the immigration laws, and limits the ability of American workers to block *ultra vires* regulations which affect them.

STATEMENT OF THE CASE

Science, technology, engineering and mathematics ("STEM") workers are vital to the American economy.[17] It is federal policy that STEM jobs should be filled by American STEM workers.[18]

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[17] U.S. Dept. of Labor, *The STEM Workforce Challenge: the Role of the Public Workforce System in a National Solution for a Competitive Science, Technology, Engineering, and Mathematics (STEM) Workforce* (2007); H. Res. 558, "Grace Hopper National Computer Science Education Week," Oct. 20, 2009, ___ Stat. __, 155 Cong. Rec. H11477 (daily ed. Oct. 20, 2009); "The legislature finds that the economic well-being of Texas and the United States, including our competitiveness in national and world markets, is increasingly dependent on technology and will require a citizenry that possesses general and specific skills in mathematics, science, computer science, and related technological subjects." *Texas Learning Tech. Corp. v. Comm'r*, 96 T.C. 686, 687-88 (Tax Court, 1991), *quoting*, Texas Educ. Code Ann. § 13.501 (Vernon Supp. 1990).

[18] H. R. Rep. No. 101-723 at 45 (1990) ("Employers seeking foreign workers have a special obligation to ensure that obtaining workers from abroad is a last resort.").

The federal government spends billions of dollars each year on STEM education.[19] American colleges are graduating record numbers of American STEM workers.[20]

Nevertheless, some employers prefer to hire foreign STEM workers.[21] Foreign STEM workers often cost less and do not complain about adverse working conditions. *See, e.g.*, Norman Matloff, *On The Need For Reform Of The H-1B Non-Immigrant Work Visa In Computer-Related Occupations*, 36 Univ. Mich. J. L. Reform 815, 868–69 (2003) ("Matloff").[22] "The desire for cheap, compliant labor is so strong that often an employer will not even consider hiring Americans." *Id.* at 818; App. I.

By 1990, the number of foreign STEM workers admitted to the United States on temporary work visas had "resulted in a labor impact necessitating a limita-

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[19] In Fiscal Year 2007, federal agencies spent $3,473,886,648 on STEM education programs. U.S. Dept. of Education, *Report of the Academic Competitiveness Council* 50 (May 2007) *available at* http://www.ed.gov/about/inits/ed/competitiveness/acc-mathscience/report.pdf.

[20] Moira Herbert, *Study: No Shortage of U.S. Engineers*, BusinessWeek, Oct. 28, 2009 *available at* http://www.businessweek.com/bwdaily/dnflash/content/oct2009/db20091027_723059.htm.

[21] *Id.*

[22] "The *de facto* indentured servitude of the H-1Bs is key to their being exploited as cheap, compliant labor. This is a major driving force underlying employer preference for H-1Bs [foreign workers] over American workers." Matloff, 36 Univ. Mich. J. L. Reform at 869–70.

tion on those admissions."[23] H. R. Rep. No. 101-723, at 67. In response, Congress created a new alien worker program, known as "H-1B," that imposed annual quotas on foreign labor and included other American labor force protections. 8 U.S.C. §§ 1182(n), 1184(g).

The annual limit on H-1B visas disturbs some American employers, who have sought to increase their ability to hire foreign STEM workers. *See, e.g.*, Statement of Bill Gates.

The limits on H-1B STEM worker visas also prompted industry to seek expanded work eligibility on student visas.[24] App. 55a. Employing F-1 student visa holders provides a number of advantages compared to aliens on H-1B visas. Because there is no statutory authorization for work on student visas, for example, there are no explicit domestic labor protections beyond the statutory restriction of "solely to pursue ... a course of study". 8 U.S.C § 1101(a)(15)(F)(i). Thus, employers need not show that Americans are unavailable, nor are they required to pay the prevailing wage. Employers also do not have to pay Medicare and So-

[23] Between May 2005 and May 2006, total U.S. employment in computer science grew by 123,460 and in engineering by 47,770. Bureau of Labor Statistics, Occupational Employment Statistics, *available at* http://www.bls.gov/oes. In Fiscal Year 2006, the number of new H-1B visas for foreign workers in those fields was equivalent to 39% of job growth. USCIS, *Characteristics of Specialty Occupation Workers (H-1B): Fiscal Year 2006, Annual Report* 11 (2008).

[24] "Representatives of high-tech industries in particular have raised significant concerns that the inability of U.S. companies to obtain H-1B visas for qualified F-1 students in a timely manner continues to result in the loss of skilled technical workers to countries with more lenient employment visa regimes, such as Canada and Australia." App. 55a; 73 Fed. Reg. 18,947.

cial Security payroll taxes for work performed on F-1 visas. 26 U.S.C. § 3121(b)(19).

Congress, however, has refused to authorize work on F-1 visas.[25] Secretary Chertoff noted: "[T]his problem is going to persist until Congress grabs the nettle and decides that we're going to put together a comprehensive immigration reform program that everybody can live with." Chertoff Remarks, App. 117a.

The Respondents then authorized work on F-1 visas by regulation.[26] This change was based on employment, not educational, purposes. "This interim final rule addresses the immediate competitive disadvantage faced by U.S. high-tech industries, and thus may quickly ameliorate some of the adverse impacts on the U.S. economy." App. 56a–57a; 73 Fed. Reg. 18,947.

As Secretary Chertoff put it:

> What this does is it allows us to continue to keep smart, well-educated foreign students who want to come over and ultimately get a work visa, allows us to keep them in place doing productive work while they are awaiting the work visa process. And that's not just good for them. It actually creates jobs in the American economy for others as well. So it's a win-win both for the students, a win-win for the employers and a win-win for American workers.

Chertoff Remarks at App. 114a.

This challenge was brought by American STEM workers who don't believe that they "won" under the Department's expansion of foreign student work eligi-

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[25] *See* n.9, *supra*.

[26] Chertoff Remarks at App. 117a.

bility. Petitioners are qualified and available to do the type of STEM jobs addressed in the Respondents' IFR. Yet, as soon as the F-1 OPT program was expanded from educational to employment-based, Petitioners found that employers were advertising exclusively for "foreign students" who were participating in the new expanded OPT program. *See, e.g.*, App. 126a.

Petitioner Michael Amanti, for example, is a Java and Java Enterprise programmer with bachelor's and master's degrees; he is currently unemployed, and sees advertisements for jobs he is qualified to take as being only available to foreign students who have recently graduated. App. 100a–101a, ¶ 6 (Compl.). He is excluded from applying for these jobs because he is an American citizen. The same is true of the other individual STEM worker Petitioners. App. 100a–105a; ¶¶ 6–17 (Compl.)

Petitioners filed suit to block the expansion of eligibility for foreign student graduates in American STEM jobs. App. G (Compl). The Court of Appeals below found that up to 40,000 foreign "students would compete with the Plaintiffs for STEM jobs." App. 4a. Nevertheless, the suit was dismissed under Fed. R. Civ. P. 12(b)(1), because the courts below felt that the Petitioners lacked standing.

Statutory and Regulatory Background

The "F-1" student visa authorizes admission to the United States for "bona fide student[s] ... solely for the purpose of pursuing ... a course of study. 8 U.S.C. § 1101(a)(15)(F)(i).

There is no statutory authorization for work under the student visa. A foreign student who works without authorization is in violation of the terms of the F-1 visa and becomes removable from the United States.

See, e.g., Kirong v. Mukasey, 529 F.3d 800, 802 (8th Cir. 2008); *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985).

Nevertheless, from 1947–1991, the INS permitted six months of work (called "practical training") required or recommended by the school. 8 C.F.R. § 125.15(b) (1947). That work period could be renewed twice. *Id.*

Aware of the potential for abuse, Congress was concerned about the possibility of foreign students competing with American workers. In 1990, the House Judiciary Committee criticized "inadequate proposals" under consideration by the INS to expand foreign student employment that "did not contain any labor safeguards." H. R. Rep. No. 101-723, at 45, 67.

In 1991 the INS expanded practical training to permit any student to engage in one year of work after graduation as "Optional Practical Training" ("OPT").[27] This work period was permitted only so students could "further their educational objectives" and to "prepare students for careers in their home countries." 56 Fed. Reg. 55,611.

At that time, the agency expressly recognized the need to protect American workers against competition from foreign student workers:

> The F-1 student employment program in the final rule represents a careful balance between the [Immigration and Naturalization] Service's desire to allow foreign students every opportunity to further their educational

[27] Nonimmigrant Classes: Students, F and M Classifications. 56 Fed. Reg. 55,608 (proposed Oct. 29, 1991) (codified at 8 C.F.R. §§ 214, 274a).

> objectives in this country and the need to avoid adversely affecting the domestic labor market. The House Judiciary Committee report on HR 4300 ... demonstrated a clear Congressional concern about the Service's plan to expand student employment authorization without any built-in labor safeguards.

56 Fed. Reg. 55,610.

As noted *supra*, at 4, after Congress refused to expand the OPT time period to 24 months after graduation, Respondents expanded the F-1 visa regulations to do the same thing:

> In April we published an interim final rule that extends the total period of Optional Practical Training from 12 to 29 months for—immigrant students[28] with a degree in science, technology, engineering or mathematics, who have accepted employment with an employer enrolled in E-Verify.

Chertoff Remarks, App. 114a.

DHS enacted the Rule without notice and comment on April 8, 2008 as an Interim Final Rule ("IFR"). App. 71a; 73 Fed. Reg. 18,944.

In addition to those foreign graduates who have a job offer from an American employer, as suggested by Secretary Chertoff, this change of the OPT pro-

[28] Secretary Chertoff's characterization of these aliens as "immigrant students" was not correct; foreign students are by definition non-immigrants "having a residence in a foreign country which he has no intention of abandoning." 8 U.S.C. §§ 1101(a)(15)(F)(i), 1184(b). Intending immigrant workers are not eligible for the OPT program.

gram from educational to employment-based also allows STEM graduates to remain in the United States while unemployed and looking for work for as long as 120 days. App. 68a–69a; 73 Fed. Reg. 18,950. DHS does not require this extended period of work or unemployment to be related to a "course of study" or that aliens who have graduated and seeking employment be a "*bona fide* student" as required under the F-1 student visa statute.[29]

DHS estimates that this expansion has "the potential to add tens of thousands of OPT workers to the total population of OPT workers in STEM occupations in the U.S. economy." App. 70a; 73 Fed. Reg. 18,950. The Third Circuit below estimated the number of foreign graduates who would remain in the United States to take STEM jobs at 40,000. App. 4a.

The Third Circuit found that "[t]hose F-1 students compete with the plaintiffs for STEM jobs." *Id.* The Third Circuit also found, without the expansion, those 40,000 foreign graduate workers would have had to return home, rather than continue working in the United States. *Id.*

Procedural Background

On May 29, 2008, Petitioners filed this challenge, alleging that the foreign graduate worker rule exceeded DHS's statutory authority, was implemented without notice and comment, and was arbitrary and capricious. Petitioners also filed a motion for a preliminary injunction and attached copies of job advertisements specifically seeking foreign student workers. App. I.

[29] A second work expansion in the IFR allows any alien worker with a pending H-1B petition to continue working until either the petition is rejected or the H-1B visas for the next fiscal year become effective. App. 66a–68a.

Before Respondents answered the Complaint, the District Court denied Petitioners' preliminary injunction motion and issued an order to show cause why the case should not be dismissed for lack of standing. App. D. "[T]his allegation expresses a general dissatisfaction with the DHS policy towards employment of non-immigrant visa holders. The complaint also seeks relief that no more directly benefits Plaintiffs than it does the public at large." App. 27a.

On August 20, 2008, Petitioners filed an Amended Complaint adding plaintiffs and allegations of specific harms. App. G. Respondents responded to the Amended Complaint with a Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

On Oct. 31, 2008, the District Court granted the Respondents' Motion to Dismiss under Fed. R. Civ. P. 12(b)(1). App. B. The District Court held that Petitioners' increased competition with "foreign students" was not an injury in fact, App. 15a–16a, that regulatory-created competition is an injury in fact only to businesses but not to workers, App. 16a n.3, and that the Rule did not increase the number of foreign workers so it did not increase competition. App. 17a n.6. The District Court also held that Petitioners' injuries were not redressable since, even if the Rule were invalidated, there would still be foreign workers competing with Petitioners. App. 18a n.6.

Furthermore, the District Court held that the Rule was lawful and that DHS properly waived notice and comment. App. 20a n.10. The district court held the petitioners alleged no facts that the DHS acted arbitrarily and capriciously. App. 20a–21a.

Petitioners filed a timely notice of appeal on Nov. 21, 2008. The case was argued on June 2, 2009. The

United States Court of Appeals for the Third Circuit affirmed the dismissal under Fed. R. Civ. P. 12(b)(1) in an unpublished, "non-precedential"[30] opinion issued on July 17, 2009. App. A.

The Third Circuit first looked at Petitioners' standing. "Particularly relevant to this case, the plaintiff, to establish prudential standing, must demonstrate that the interest it seeks to protect is arguably within the zone of interests to be protected ... by the statute ... in question." App. A (citation omitted).

> The plaintiffs claim that they were and continue to be injured by F-1 STEM students who, instead of leaving the country after 12 months of OPT, remain in the country by taking on additional OPT and filing an H-1B petition. Those F-1 students compete with the plaintiffs for STEM jobs. Absent the IFR, those students would be forced to return to their home countries after 12 months of OPT and would not threaten the plaintiffs' job prospects. Yet, perhaps because they viewed the relevant statute as the entire INA, the plaintiffs never argue precisely why this injury arguably falls within the zone of interests protected by § 1101(a)(15)(F)(i) in particular. We hold that this injury does not fall within that zone, and, therefore, that the plaintiffs lack prudential standing.

App. 8a.

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[30] *But see*, Fed. R. App. P. 32.1; *Comm'r of INS v. McCoy*, 484 U.S 3. 7 (1987) (unpublished opinion exceeded jurisdiction).

The Third Circuit, citing *Federation for Am. Immigration Reform*[31] *v. Reno*, 93 F.3d 897, 899 (D.C. Cir. 1999) ("*FAIR*") (citizens cannot use immigration laws' American worker protections to challenge non-worker "humanitarian parole" decisions), held that the lack of language in the F-1 provision explicitly protecting American workers meant that Petitioners were not within the zone of interests of the immigration laws. App. 11a.

The Third Circuit also relied on another case, *Int'l Union of Bricklayers & Allied Craftsman v. Meese*, 761 F.2d 798 (D.C. Cir. 1985) ("*Bricklayers*"), "a case where the court held that domestic workers' interest in limiting competition in the job market generated by an influx of alien laborers fell within the zone of interests protected by a provision of the INA," which it thought relied on express language in the statute protecting American workers.[32] App. 9a–10a.

The Third Circuit noted that the INS had offered practical training and OPT for many years, and that Congress had several opportunities to reject or ad-

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[31] The Federation for American Immigration Reform, a non-profit organization, is affiliated with the Immigration Reform Law Institute, which provided trial and appellate counsel to Petitioners.

[32] The Third Circuit was incorrect in its understanding of the situation in *Bricklayers*. The alien workers in *Bricklayers* were admitted on "B" visitors visas. 761 F.2d at 800–801. Like the F-1 visa provision, the "B" visa category has no express language providing American worker protections. 8 U.S.C. § 1101(a)(15)(B) ("[A]n alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure.").

dress these opportunities for foreign students to work. App. 10a–11a. The Third Circuit believed that Congressional inaction:

> [P]rovides further evidence that protection of domestic workers was not among Congress's concerns in enacting and re-enacting the F-1 status provision, and it tends to suggest that Congress—like DHS in issuing the IFR—was concerned with increasing the country's pool of available STEM workers.

App. 10a.

The Third Circuit did not cite or note the 1990 House Judiciary Committee Report criticizing foreign student employment or the congressional rejections of the same expansion undertaken by Respondents, both described *supra*, at 4, 11–12. Nor did the Third Circuit note Respondents' 1991 regulations creating the OPT program itself, with its "careful balance" between the needs of the students and "the need to avoid adversely affecting the domestic labor market." 56 Fed. Reg. 55,610.

The Third Circuit also did not address the Fed. R. Civ. P. 12(b)(6) or merits holdings by the District Court. App. 11a, n.2.

The Third Circuit denied a timely petition for rehearing on Aug. 17, 2009. App. C.

REASONS TO GRANT THE PETITION

A primary purpose of the immigration statutes is to "preserve jobs for American workers." *INS v. Nat'l Center for Immigrants' Rights*, 502 U.S. 183, 194 (1991); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984). One of the "great purposes was to protect American labor against the influx of foreign labor." *Karnuth v. United States*, 279 U.S. 231, 244 (1929).

Other courts have universally accepted protection of American labor as a fundamental purpose of the immigration statutes. *FAIR*, 93 F.3d at 904 ("clear concern about protecting the job opportunities of United States citizens"); *Bricklayers*, 761 F.2d at 805 ("Congress has thus been concerned with the impact of competition by foreigners on the American labor force since 1885, and has passed increasingly restrictive legislation on the entry of non-immigrant alien workers."); *Int'l Longshoremen's and Warehousemen's Union v. Meese*, 891 F.2d 1374, 1379 (9th Cir. 1989); *Medellin v. Bustos*, 854 F.2d 795 (5th Cir. 1988); *Patel v. INS*, 811 F.2d 377 (7th Cir. 1986) ("*Patel*"); *Londono v. INS*, 433 F.2d 635, 636 (2d Cir. 1970); *Digilab v. Sec'y of Labor*, 495 F.2d 323, 326 (1st Cir. 1974).

In their 2008 regulatory expansion of the challenged regulations, Respondents eliminated that focus on protecting American labor. The lower courts here adopted that reversal of policy, as well as a rationale that conflicts with Congress's express language, Respondents' prior policies and statements, and several lines of judicial precedent.

I. The Decision Below Conflicts With the Statutory Language, Congress's Expressed Intent, Respondents' Prior Policy and Other Circuits' Longstanding Views on Worker Protections in the F-1 Visa Statute and on American Workers' Ability to Challenge the Admission of Foreign Workers Competing for Domestic Jobs:

The Third Circuit's opinion below is the first post-1990 decision on foreign student work authorization under the OPT program. In contrast to the uniform understanding of the immigration laws as protecting American workers, as shown *supra* at 18, the Third Circuit found that:

> [P]rotection of domestic workers was not among Congress's concerns in enacting and re-enacting the F-1 status provision, and it tends to suggest that Congress—like DHS in issuing the IFR—was concerned with increasing the country's pool of available STEM workers. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative ... interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

App. 10a.

The Third Circuit also held that American workers were not within the "zone of interests" of the immigration laws because there was no express worker language in the F-1 visa provision. App. 10a. It suggested that the D.C. Circuit in *FAIR* and *Bricklayers* agreed that express language is required for Ameri-

can workers to be within the zone of interests. App. 9a–10a.

This finding that Congress was "not ... concern[ed]" about protecting U.S. workers in enacting and revisiting the F-1 visa provisions conflicts with the statutory language, Congress's express statements about protecting American workers, with the agency's own prior positions and policies, and with other Circuits' holdings on Congressional intent. The holding that American workers are not within the zone of interests of the immigration laws conflicts with numerous decisions of this and the Circuit Courts on the ability of American workers to challenge the admission of competing alien workers.

A. The Statutory Language of the Foreign Student Program Permits Only Educational, Not Employment, Activities:

The statutory language of the F-1 visa program permits an alien to enter the United States only if the alien, "is a *bona fide* student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study." 8 U.S.C. § 1101(a)(15)(F)(i). There is no statutory authorization for an alien admitted on an F-1 visa to work in the United States.

The sole rationale for the expansion is to allow F-1 students who have already graduated to remain in the United States to search for and take jobs. "What this does is it allows us to continue to keep smart, well-educated foreign students who want to come over and ultimately get a work visa, allows us to keep them in place doing productive work while they are awaiting the work visa process." Chertoff Remarks, App. 114a.

There is no statutory authority in 8 U.S.C. § 1101(a)(15)(F)(i) to do this. There may be authority in another section of the immigration laws,[33] but the F-1 visa category cannot be expanded by regulation to include non-students. Any expansion or creation of a new visa category for foreign STEM graduates must be done by Congress, which has chosen not to do so.

B. Congress Has Long Been Concerned with Labor Protections in F-1 Visas:

In the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 ("IRCA"), Congress "corrected abuse by many groups, including foreign students." *United States v. Oloyede*, 982 F.2d 133, 137–38 (4th Cir. 1993), *quoting*, H.R. Rep. No. 99-682(I), 99th Cong., 2nd Sess., U.S. Code Cong. & Admin. News 1986, 5654 ("the Committee has placed restrictions on the ability of these students to remain in the United States and seek lawful permanent resident alien status.").

In 1990, the House Judiciary Committee complained that INS proposals to expand foreign student employment "did not contain any labor safeguards." H. R. Rep. No. 101-723, at 45, 67 (1990). When Congress addressed employers' requests for more STEM workers in 1990, it did so through the H-1B visa provision, whose limits include strict annual quotas on visa issuance and other worker protections. *Id.*

These specific Congressional actions cannot be reconciled with the Third Circuit's contention that "protection of domestic workers was not among Congress's

[33] *See, e.g.*, 8 U.S.C. § 1184(n)(2), providing for temporary residence for a worker while waiting for a permanent resident worker visa.

concerns in enacting and re-enacting the F-1 status provision." App. 10a. In addition, the Third Circuit's contention that "Congress—like DHS in issuing the IFR—was concerned with increasing the country's pool of available STEM workers," conflicts both with existing federal policy to use domestic STEM workers and with Congress's decision not to expand either the H-1B visa quotas or F-1 student employment.

C. Before 2008, Respondents Themselves Had a Policy of Preserving American Jobs from Foreign Students:

Respondents themselves have long been concerned with protecting American workers.

> One of the conditions stated in the [foreign students' Maintenance of Status] Bond, *a condition designed, of course, to preserve American jobs for bona fide members of the American labor force*, was that, being admitted as a foreign student, during Islam's stay in the United States as a student, Islam would not accept "unauthorized employment," that is, employment that had not received prior approval from the Service.

Ahmed v. United States, 480 F.2d 531, 532 (2d Cir. 1973) ("*Ahmed*") (emphasis added).

Similarly, in 1991 when Respondents administratively created the OPT program itself, Respondents were careful to reflect Congressional intent to protect American workers: "The House Judiciary Committee report on HR 4300 ... demonstrated a clear Congressional concern about the [Immigration and Naturalization] Service's plan to expand student employment

authorization without any built-in labor safeguards." 56 Fed. Reg. 55,610.

In response, Respondents crafted a "careful balance" which existed until the challenged April 2008 expansion of the program: "The F-1 student employment program in the final rule represents a careful balance between the Service's desire to allow foreign students every opportunity to further their educational objectives in this country and *the need to avoid adversely affecting the domestic labor market.*" *Id.* (emphasis added).

If, as the Third Circuit contends in its decision below that Congress was "aware" of the F-1 foreign student OPT work program, and acquiesced in the F-1 regulations, App 10a, it is precisely because Congress was told by Respondents that the OPT program "contain[ed] labor safeguards" and "avoid[ed] adversely affecting the domestic labor market." 56 Fed. Reg. 55,610. In fact, as shown *supra*, at 4, by rejecting numerous attempts to increase the number of foreign STEM workers, Congress had considered "increasing the country's pool of STEM workers" and believed that the increase should come from domestic, not foreign student, workers.

The Third Circuit flipped Congressional intention on its head. Only Secretary Chertoff rationalized the program as a "win-win" for American workers. App. 114a. Congress did not do so by acquiescence.

D. The Third Circuit's Opinion Conflicts with Other Circuits Which Have Held that the F-1 Student Visa Includes Protections for American Workers:

Unlike the Third Circuit, other Circuits have held that protection of domestic workers was among Congress's concerns in enacting and re-enacting the F-1 status provision. *See, e.g. Patel,* 811 F.2d at 383 (Board of Immigration Appeals entitled to deny foreign student's adjustment of status based on unauthorized employment because "In large measure the immigration laws are intended to protect the domestic labor force."); *Ahmed,* 480 F.2d at 532 (foreign students' employment authorization condition "designed, of course, to preserve American jobs for bona fide members of the American labor force.").

E. The Third Circuit's Opinion Conflicts with Other Circuits Which Have Held that American Workers Can Challenge the Admission of Competing Alien Workers:

The Third Circuit made findings which indicate that Petitioners had standing to maintain this case:[34] "Those F-1 students compete with the plaintiffs for STEM jobs. Absent the IFR, those students would be forced to return to their home countries after 12 months of OPT and would not threaten the plaintiffs' job prospects." App. 4a.

Nevertheless, the Third Circuit held that, "the plaintiffs never argue precisely why this injury ar-

[34]A plaintiff must allege three elements to satisfy the constitutional component of standing: 1) injury in fact; 2) a fairly traceable causal connection between defendants' conduct and the injury; and 3) the injury is likely to be redressed by the relief sought. *Allen v. Wright,* 468 U.S. 737, 750–51 (1984).

guably falls within the zone of interests protected by § 1101(a)(15)(F)(i) in particular. We hold that this injury does not fall within that zone, and, therefore, that the plaintiffs lack prudential standing." App. 8a.

The Third Circuit's holding was predicated on its belief that, "the F-1 status provision contains no language conditioning entry into the United States on noninterference with domestic labor conditions." App. 10a.

This belief has no foundation. As shown *supra*, at 21–24, the Third Circuit was mistaken about the lack of worker protections in the foreign student program. Congress, Respondents and reviewing courts have long held that the foreign student program cannot be used to "interfere[] with domestic labor conditions." App 10a.

The Third Circuit was also similarly mistaken about the need for specific worker protection language in the F-1 provision itself. The Third Circuit cited two opinions from the D.C. Circuit as support, but each of those opinions actually rejects the Third Circuit's reasoning.

1. FAIR v. Reno, *Like "Zone-of-Interest" Decisions of This Court, Does Not Require Express Language in the Specific Immigration Law Provision:*

In support of its position, the Third Circuit cited the D.C. Circuit's decision in *FAIR*. App. 8a–10a ("supports our determination that the STEM workers fail the zone-of-interests test in this case."). Yet neither *FAIR* nor any other "zone of interests" case requires that there be specific language in the provision challenged in a case:

> We do not believe that an affirmative signal of Congressional intent to permit a suit is *required* for a finding of prudential standing; a different conclusion would be difficult to reconcile with the Court's statement in *Clarke* that "the [zone-of-interests] test is not meant to be especially demanding; in particular, there need be *no indication of congressional purpose to benefit* the would-be plaintiff." 479 U.S. at 399–400.

93 F.3d at 902 (emphasis in original).

FAIR said, "we have viewed parties as showing a protected interest if either they were intended by Congress as 'beneficiaries' of the statute or we could infer that Congress intended them as a 'suitable challenger.'" 93 F.3d at 900. By a "suitable challenger," the D.C. Circuit meant having "more than a marginal relationship to the statutory purposes." *Id.*, *quoting Clarke v. Securities Indus. Ass'n.*, 479 U.S. 388, 399 (1987).

Petitioners are STEM workers who are available to do the jobs which the "foreign students" are being allowed to seek. The Third Circuit recognized that the challenged regulations deal specifically and only with STEM jobs: "Congress—like DHS in issuing the IFR—was concerned with increasing the country's pool of available STEM workers." App. 10a. American STEM workers would seem to be either "beneficiaries" of the worker protections every other observer sees in the F-1 program, or to have "more than a marginal relationship to the statutory purposes." Rather than supporting the Third Circuit's analysis, *FAIR* actually conflicts with it.

2. Contrary to the Third Circuit's Characterization, Bricklayers v. Meese *Does Not Require Express Language in the Specific Provision, and the American Workers in* Bricklayers *Relied on a Provision Which Contained No Such Express Language:*

The Third Circuit, in its discussion of *FAIR*, also mentioned *Int'l Union of Bricklayers v. Meese*, 761 F.2d 798, as supporting its "no language" rationale. App. 9a–10a. In *Bricklayers*, U.S. workers challenged an INS procedure that admitted foreign bricklayers on "B" visitor visas. *Id.* at 800.

The Third Circuit mischaracterized the situation in *Bricklayers*, since "B" visitor visas, like F-1 student visas, do not have language incorporating worker protections.[35] The *Bricklayers* court, on facts very similar to those in this case, held that the competition from the foreign workers was an injury in fact. *Id.* at 802 "We must conclude that appellants fall within the 'zone of interest' created by the Act before us." *Id.* at 805.

Bricklayers, therefore, stands for the proposition that American workers have standing to challenge foreign workers' admission even if the specific visa provision used by the aliens contains no express language regarding the protection of American workers. This is the exact opposite of the Third Circuit's main

[35] 8 U.S.C. § 1101(a)(15)(B) ("an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure.").

holding, and the opposite of the Third Circuit's characterization of *Bricklayers*.

The Third Circuit's rationale for denying prudential standing will produce uncertainty about the zone-of-interest test and the applicability of worker protections in the immigration laws. This Court in *Clarke* did not require specific language in the exact challenged statutory language, yet the Third Circuit used a "specific language" test as its entire rationale for denying standing.

The Third Circuit's rationale would have resulted in different outcomes in prior cases. *Bricklayers*, for example, had a very similar factual situation: American workers challenging foreign workers competing in their specific occupation, admitted under a statutory provision without specific protections for American workers. In *Bricklayers*, the American workers had standing; here the American workers did not.

The Court should issue a writ to prevent the Third Circuit's unsupported rationales from confusing both the protections available to American workers and the zone-of-interest tests.

CONCLUSION

Petitioners therefore respectfully urge the Court to issue the writ.

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November 13, 2009

APPENDIX

Appendix A—Opinion of the Third Circuit (July 17, 2009)

Not Precedential

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-4642

THE PROGRAMMERS GUILD, INC.; AMERICAN ENGINEERING ASSOCIATION, INC.; BRIGHT FUTURE JOBS; MICHAEL AMANTI; MARK BLACKBURN; TONI L. CHESTER; DAVID HUBER; JOHN G. MARSON; HARRISON PICOT, II; PAUL E. POLAK; MIKE ROTHSCHILD; ROBERT SANCHEZ; STEPHEN BERRY; STEPHANIE M. BERRY, Appellants

v.

MICHAEL CHERTOFF, In his capacity as Secretary of Homeland Security, United States Department of Homeland Security; UNITED STATES DEPARTMENT OF HOMELAND SECURITY

On Appeal From the United States District Court for the District of New Jersey
(No. 08-cv-2666)
District Judge: Honorable Faith S. Hochberg

Argued June 2, 2009

Before: FISHER and CHAGARES, Circuit Judges, and DIAMOND,* District Judge
(Filed : July 17, 2009)

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*Honorable Paul S. Diamond, United States District Judge for the Easterm District of Pennsylvania, sitting by designation.

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Opinion of the Court

CHAGARES, Circuit Judge.

The plaintiffs appeal from the District Court's order dismissing their complaint. We will affirm.

I.

Because we write solely for the benefit of the parties, we will recite only the essential facts.

An alien seeking to attend school in the United States may apply for "F-1" status–and, if granted, may reside lawfully in the country–for as long as he is a full-time student. After he completes his academ-

ic program, he can maintain F-1 status for a limited time while engaging in employment directly related to his field of study, called "optional practical training" ("OPT"). After OPT ends, the student has a short grace period in which to arrange for a new method of remaining in the United States or, failing that, to leave it.

One popular method of remaining in the country is obtaining "H-1B" status in connection with anticipated future employment in a technical field requiring advanced study. To obtain H-1B status, the prospective employer files a petition on the student's behalf. If the petition is granted, the F-1 student can be present in the country for up to six years from the date that employment begins. Congress caps the number of individuals who may assume H-1B status each year. The application timetable, however, causes the average student to have a gap between the expiration of his F-1 status and the commencement of his H-1B status.

Prior to April 8, 2008, the Department of Homeland Security ("DHS") limited OPT to 12 months. Also, a student whose F-1 status had expired but whose H-1B petition was pending was not entitled to remain in the country while it was being considered. On April 8, 2008, DHS, citing its authority pursuant to the Immigration and Nationality Act of 1952 ("INA"), issued an interim final rule ("IFR") addressing these issues. The IFR extends OPT to 29 months for students in science, technology, engineering, or mathematics (the so-called "STEM" fields). It also allows an F-1 student with a pending H-1B petition to remain in the country until the petition is formally ruled upon and, if ultimately granted, until he begins work.

The Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b), (d), provides that an agency normally must

give public notice of a proposed rulemaking, solicit comments from interested persons, and, once the rule is ultimately issued, wait 30 days before enforcing it. DHS invoked a statutory "good cause" exception allowing it to skip these steps and declare the IFR effective immediately, on the ground that any delay was "impracticable, unnecessary, or contrary to the public interest." DHS found that STEM fields were experiencing a severe labor shortage, and it estimated that the IFR would allow over 40,000 STEM students, who otherwise would have to leave the country, to remain in the United States and help alleviate the shortage.

A handful of domestic workers in or about to enter the STEM job market, and organizations representing them and others similarly situated, filed a complaint in federal court seeking to invalidate the IFR. Invoking the APA's judicial-review provision, 5 U.S.C. § 702, they claimed that, in issuing the IFR, DHS exceeded the scope of its INA authority, acted arbitrarily and capriciously, and failed to justify its use of the "good cause" exception to full-blown rulemaking procedure. The plaintiffs allege that the rule has harmed them by increasing the supply of workers who compete with them for jobs, forcing wages down, prompting employers to replace non-OPT workers with OPT workers, and causing employers to fill open positions only with OPT workers.

DHS filed a motion to dismiss for lack of standing pursuant to Fed. R. Civ. P. 12(b)(1), and, in the alternative, pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The District Court granted the motion, holding that the plaintiffs lacked standing and that their claims were meritless as a matter of law. The plaintiffs then filed this appeal.

II.

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346. We have jurisdiction pursuant to 28 U.S.C. § 1291.

To maintain an action in federal court, a plaintiff must demonstrate constitutional standing by satisfying several requirements imposed by Article III of the Constitution. *See Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 137–38 (3d Cir. 2009) (outlining Article III's "irreducible constitutional minimum"). The plaintiff must also demonstrate prudential standing by meeting certain judge-made requirements designed to limit the exercise of federal jurisdiction. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

Particularly relevant to this case, the plaintiff, to establish prudential standing, must demonstrate that the interest it seeks to protect "is arguably within the zone of interests to be protected...by the statute... in question." *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (discussing zone-of-interests test in context of APA challenge to agency action). The "statute...in question" encompasses more than just the provision allegedly violated by the administrative action. It also includes other provisions having an "integral relationship" to that provision. *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 530 (1991). The "integral relationship" requirement should not be applied too rigidly, *see Davis v. Phila. Housing Auth.*, 121 F.3d 92, 98 n.8 (3d Cir. 1997), but it also should not be applied so loosely– uch as by deeming each section of an act "integrally related" to all other sections – as to render it meaningless, Air Courier Conference, 498 U.S. at 529-30. Factors to consider in determining whether two provisions in an act are integrally related include whether both pro-

visions address similar subject matter, whether legislative history reveals that they share a common purpose, and whether they are located in a common section or subsection of the act. *See Fed'n for Am. Immig. Reform v. Reno*, 93 F.3d 897, 903–04 (D.C. Cir. 1999) (discussing "integral relationship" analysis).

After the court identifies the "statute...in question," it must determine whether the plaintiff's interests "arguably fall within the zone of interests to be protected" by it. This determination, like the "integral relationship" analysis, is "not meant to be especially demanding." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 (1987). The plaintiff need not show that Congress intended him, in particular, to benefit from the provisions. *Id.* But, he must show that his interests are more than "marginally related to...the purposes implicit in the statute." *Id.*

III.

A.

The plaintiffs argue that the relevant statute is the entire INA. The Supreme Court has squarely disallowed such a kitchen-sink approach, however, and requires litigants to identify the relevant provisions with some particularity. *See Air Courier Conference*, 498 U.S. at 529–30.

The relevant provision here is the one the plaintiffs allege DHS actually violated: 8 U.S.C. § 1101(a)(15)(F)(i), defining F-1 status. It states that an alien "who seeks to enter the United States temporarily and solely for the purpose of pursuing ... a course of study" at a DHS-approved educational institution is deemed a "non-immigrant." Subse-

quent provisions allow the Attorney General to admit such non-immigrants into the country.[1]

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[1] For the first time on appeal, the plaintiffs 1 identify two other potentially relevant INA provisions: § 1182(a)(5)(A)(i) and (n)(1)(A). The first, § 1182(a)(5)(A)(i), states:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified . . . that . . . the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The second, § 1182(n)(1)(A), requires an employer filing an H-1B petition on an alien's behalf to include such a certification in the application.

Resort to these labor-certification provisions fails for two reasons. First, the plaintiffs failed to bring these provisions to the attention of the District Court. Therefore, we need not consider them on appeal. See *Common Cause v. Pennsylvania*, 558 F.3d 249, 263 (3d Cir. 2009) (explaining that even though this Court has an obligation to determine whether the plaintiff had standing in the district court, "[a] litigant generally cannot create standing through new allegations raised for the first time on appeal").

Second, even if we were to entertain these arguments, we would hold that the labor-certification provisions are not "integral[ly] relat[ed]" to the F-1 status provision within the meaning of Air Courier Conference and therefore do not enter into our zone-of-interests analysis. The provisions address different subjects. The F-1 status provision addresses eligibility to enter the country to study, whereas the labor-certification provisions address eligibility to enter the country to work. True, OPT employers often arrange for F-1 students to become H-1B workers, but F-1 status is neither necessary nor sufficient to obtain H-1B status. The plaintiffs point to no legislative history linking the purpose of the labor-certification provisions with the purpose of the F-1 status provision. In addition, the labor-certification provisions are located in an INA subsection different from that containing the F-1 status provision. *See Fed'n for Am. Immig. Reform*, 93 F.3d at 903–04 (holding INA immigration quota provision not "integral[ly] relat[ed]" to INA provision allowing Attorney General to parole aliens into

B.

The plaintiffs claim that they were and continue to be injured by F-1 STEM students who, instead of leaving the country after 12 months of OPT, remain in the country by taking on additional OPT and filing an H-1B petition. Those F-1 students compete with the plaintiffs for STEM jobs. Absent the IFR, those students would be forced to return to their home countries after 12 months of OPT and would not threaten the plaintiffs' job prospects. Yet, perhaps because they viewed the relevant statute as the entire INA, the plaintiffs never argue precisely why this injury arguably falls within the zone of interests protected by § 1101(a)(15)(F)(i) in particular. We hold that this injury does not fall within that zone, and, therefore, that the plaintiffs lack prudential standing.

The Court of Appeals for the District of Columbia Circuit's opinion in *Federation for American Immigration Reform* addresses the application of the zone-of-interests test in the context of a limitation on the Attorney General's ability to allow aliens to enter the country and supports our determination that the STEM workers fail the zone-of-interests test in this case. In 1994, the Government entered into an agreement with Cuba whereby it would admit at least 20,000 Cubans per year as legal immigrants. 93 F.3d at 899. The Attorney General decided to help achieve this goal by "paroling" several thousand Cubans each year and then permitting them to apply for lawful

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the country for a limited time because the two provisions addressed different subject matter, no legislative history linked the purpose of one provision with the purpose of the other, and the provisions were located in different subsections of the INA).

permanent resident status. *Id.* A coalition of Miami residents filed suit, alleging that this decision violated the parole statute, § 1182(d)(5)(A), which provides:

> The Attorney General may... in his discretion parole into the United States temporarily...for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purpose of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled ....

Specifically, the residents alleged that the Attorney General was using parole effectively to admit the aliens (rather than allow them to be present temporarily), a practice the statute expressly prohibits. 93 F.3d at 900. They asserted that the unlawfully-paroled Cubans were damaging their employment prospects by entering the job market and providing additional competition. *Id.* at 903.

The court of appeals held that this injury did not arguably fall within the zone of interests protected by the parole statute. *Id.* at 903-04. It rejected the Miami residents' argument that harm to job prospects is within the zone of interests protected by immigration laws under *International Union of Bricklayers & Allied Craftsman v. Meese*, 761 F.2d 798 (D.C. Cir. 1985), a case where the court held that domestic workers' interest in limiting competition in the job market generated by an influx of alien laborers fell within the zone of interests protected by a provision of the INA. In that case, the plaintiffs alleged a violation of what is now § 1182(a)(5)(A)(i), a provision requiring the

Secretary of Labor to certify that "the employment of such aliens will not adversely affect the wages and working conditions of workers in the United States similarly employed." The *Federation for American Immigration Reform* court observed that the parole statute, in contrast, contained no such language. *See* 93 F.3d at 903.

This suggests that the plaintiffs here, too, fail to meet the zone-of-interests test. Like the parole statute at issue in Federation for American Immigration Reform, the F-1 status provision contains no language conditioning entry into the United States on noninterference with domestic labor conditions. Furthermore, at least since 1947, federal agencies dealing with immigration have interpreted § 1101(a)(15)(F)(i) to allow a student to engage in on-the-job training to supplement his in-the-classroom training. See 8 C.F.R. § 125.15(b) (1947). Yet, each time Congress has re-enacted § 1101(a)(15)(F)(i) – including October 10, 2008, see Pub. L. No. 110-391, § 2(a)-(b), 122 Stat. 4193, 4193-94 (2008) (amending § 1101(a) but leaving subsection (15)(F)(i) intact), six months after DHS issued the IFR – it has chosen not to add language mandating that those OPT students not adversely affect similarly-employed domestic workers. This provides further evidence that protection of domestic workers was not among Congress's concerns in enacting and re-enacting the F-1 status provision, and it tends to suggest that Congress–like DHS in issuing the IFR–was concerned with increasing the country's pool of available STEM workers. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative ... interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). That Congress has over the years

chosen to include such language in defining other categories of non-immigrants, see § 1101(a)(15)(Q) (defining as non-immigrant "an alien coming temporarily ...to the United States as a participant in an international cultural exchange program...for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and *who will be employed under the same wages and working conditions as domestic workers*," thereby preventing such an alien from undercutting domestic workers' salary demands) (emphasis added), reinforces this conclusion.

In sum, case law and our own examination of Congress's treatment of the F-1 status provision lead us to hold that the plaintiffs' injury does not fall within the zone of interests protected by § 1101(a)(15)(F)(i).

IV.

For the reasons mentioned above, we will affirm the District Court's order dismissing the complaint pursuant to Rule 12(b)(1).[2]

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[2] Because we will affirm the District Court's order for lack of prudential standing, we express no opinion on the District Court's resolution of the other issues in this case, namely constitutional standing and the merits of the plaintiffs' substantive challenges.

Appendix B—District Court's Dismissal Opinion (Oct. 31, 2008)

NOT FOR PUBLICATION CLOSED

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THE PROGRAMMERS GUILD, INC.; AMERICAN ENGINEERING ASSOCIATION; BRIGHT FUTURE JOBS; et al., Plaintiffs,

v.

MICHAEL CHERTOFF in his capacity as Secretary of Homeland Security and UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Defendants.

Civil Case No. 08-2666 (FSH)

OPINION and ORDER

Date: October 31, 2008

HOCHBERG, District Judge

This matter having come before the Court upon the Motion to Dismiss for lack of standing pursuant to Fed. R. Civ. P. 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) filed by the Defendants, the Department of Homeland Security ("DHS") and Secretary of DHS, Michael Chertoff; and the Court having considered the written submissions of the parties pursuant to Fed. R. Civ. P. 78; and

it appearing that Plaintiffs The Programmers Guild, Inc.; American Engineering Association: Bright Future Jobs; Michael Amanti; Mark Blackburn; Toni L. Chester; David Huber; John G. Marson; P. Harrison

Picot II; Paul E. Polak; Mike Rothschild; Robert Sanchez; Stephen Berry; and Stephanie Berry ("Plaintiffs"), a group of three representative organizations and eleven individuals trained in computer programming and engineering, seek to enjoin the implementation and enforcement of an Interim Final Rule ("IFR") extending the period of time in which technically-trained students may remain within the United States as lawful nonimmigrants while participating in the Optional Practical Training ("OPT") program;[1] and

it appearing that Plaintiffs bear the burden of establishing their standing to bring this action, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); and

it appearing that "[s]tanding has constitutional and prudential components, both of which must be satisfied before a litigant may seek redress in the federal courts," *UPS Worldwide Forwarding, Inc. v. U.S. Postal Service*, 66 F.3d 621, 625 (3d Cir. 1995); and

it appearing that courts recognize that "the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact' - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be 'fairly trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable deci-

[1] See 73 Fed. Reg. 18944-02, 2008 WL 925258 (F.R.); 8 U.S.C. § 1101(a)(15)(F)(i).

sion.' Lujan, 504 U.S. at 560–561 (internal citations omitted); and

it appearing that the rules of prudential standing require that "(1) a litigant assert his [or her] own legal interests rather than those of third parties, (2) courts refrain from adjudicating abstract questions of wide public significance which amount to generalized grievances and (3) a litigant demonstrate that her interests are arguably within the zone of interests intended to be protected by the statute, rule or constitutional provision on which the claim is based," Wheeler v. Travelers Ins. Co., 22 F.3d 534, 538 (3d Cir.1994) (internal quotations and citations omitted); and

it appearing that Plaintiffs, relying on the "competitor standing doctrine,"[2] cite the "increased economic competition" resulting from an increased supply of workers in their professional fields as the injury-in-fact caused by implementation of the IFR; and

it appearing that Plaintiffs have failed to establish an injury-in-fact because courts have applied the competitive standing doctrine only in limited circumstances and only when an agency action imposes a competitive

[2] The "competitor standing doctrine," also known as the "competitive standing doctrine," arises when a regulatory change creates additional competition for a plaintiff, who challenges the competition itself as an injury-in-fact. Courts have, for example, considered the imminent loss of business to be an injury-in-fact. *See UPS Worldwide Forwarding*, 66 F.3d at 626; *see also Adams v. Watson*, 10 F.3d 915, 921 (1st Cir. 1993) (surveying precedent establishing economic competition as injury-in-fact).

injury to businesses, rather than to individuals such as job applicants;[3] and

it appearing that, even if increased competition for jobs constituted an injury-in-fact, Plaintiffs have failed to allege facts establishing that their injuries are "concrete and particularlized" or "actual or imminent," rather than "conjectural or hypothetical;"[4] and

it appearing that Plaintiffs argue that their unemployment or under-employment is causally linked to the 17-month extension of OPT eligibility; and

it appearing that the "causal connection aspect of standing requires that the injury be fairly traceable to the challenged conduct of the defendant and not be a result of independent actions of third parties not before the court," *Hartz Mountain Indus., v. Polo*, 2005 WL 2807355, *8 (D.N.J. Oct. 26, 2005); and

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[3] As Defendants argue, the competitor standing doctrine has not been applied to prevent competition among job applicants. The cases highlighted by the parties focus, instead, on imminent competitive injuries to businesses. Plaintiffs have not offered a compelling justification for expanding the competitor standing doctrine to cover individuals competing for jobs, and the Court declines to do so.

[4] See, e.g., *Schurr v. Resorts Intern. Hotel, Inc.*, 196 F.3d 486, 495 (3d Cir. 1999) (finding that plaintiff, a job applicant challenging a regulation setting minority employment goals, was unable to prove that implementation of the regulations caused "imminent injury" and, as a result, lacked the standing to challenge future rather than past application of the regulation).

it appearing that Plaintiffs have not established a causal nexus between their alleged injuries and the IFR because neither the individual nor organizational Plaintiffs are directly regulated by the IFR, and because their employment status is dependent upon the independent actions of third parties;[5] and

it appearing that Plaintiffs argue that an injunction will redress their alleged injury by reducing the number of OPT workers in their fields by up to 59%; and

it appearing that a plaintiff must allege that an injury is "likely to be redressed by the requested relief," *Allen v. Wright*, 468 U.S. 737, 751 (1984); and

it appearing that Plaintiffs' alleged injuries are not likely to be redressed by a favorable decision because invalidating the proposed extension would neither

[5] Plaintiffs do not, and in fact cannot, show that the IFR is solely, or even primarily, responsible for their alleged injuries. Plaintiffs are currently unemployed or under-employed as a result of a wide range of independent factors. While the existence of the OPT program itself may be such a factor, Plaintiffs are not challenging the program overall. In the context of these other factors, such as "job saturation ... high fuel costs, outsourcing, [and] improved technology," it can not be established that the extension implemented by the IFR is on its own the cause of their employment problems.

eliminate competition for jobs in their field nor guarantee the improved economic conditions sought;[6] and

it appearing that Plaintiffs have failed to establish prudential standing because the threat of increased competition for jobs posed by the IFR is only a generalized grievance with a particular government policy rather than a concrete and particularized injury;[7] and

it appearing that Plaintiffs have also failed to satisfy the zone of interests test required to establish prudential standing because the purposes of the IFR are to improve the U.S.'s competitive position for students and workers in these fields while easing visa application procedures for OPT students, not to increase competi-

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[6] As Defendants emphasize, even with invalidation of the IFR, Plaintiffs would still face competition from existing OPT students and aliens with H-1B visas. Moreover, the IFR does not itself increase the number of visas available and does not, therefore, directly increase the number of applicants competing with Plaintiffs for jobs in this field. The number of visas available in total is unaffected by the IFR, so the number of potential foreign competitors is also unaffected. As the DHS has made clear, the IFR primarily affects how OPT students can secure such visas.

[7] See Lujan, 504 U.S. at 574 ("a plaintiff raising only a generally available grievance about government - claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large - does not state an Article III case or controversy."); see also Allen, 468 U.S. at 754; Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 483 (1982).

tion within the U.S. for these jobs or harm American workers in these professions;[8] and

it appearing, in the alternative, that a motion to dismiss under Rule 12(b)(6) should be granted "if it appears to a certainty that no relief could be granted under any set of facts which could be proved," see *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997);[9] and

it appearing that to survive a Rule 12(b)(6) Motion to dismiss, "factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true even if doubtful in fact," *Bell Atlantic*

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[8] Under the zone of interests test, plaintiffs must establish that the "interest [they] seek[] to vindicate is arguably within the 'zone of interests to be protected or regulated by the statute' in question." Director, Office of Workers' Compensation Programs, Dept. Of Labor v. Newport News, 514 U.S. 122, 128 (1995). Because the DHS clearly explained that the purpose of the IFR is to make it easier for foreign students to continue working in OPT programs and, therefore, make it easier for U.S. employers to hire and benefit from these highly skilled students, it is clear that the interests of similarly skilled American workers were not the intended target of the IFR.

[9] Although a court does not need to credit a complaint's "bald assertions" or "legal conclusions," it is required to accept as true all of the allegations in the complaint as well as all reasonable inferences that can be drawn therefrom and view them in the light most favorable to the plaintiff. Morse, 132 F.3d at 906, citing *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989). See also *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429-30 (3d Cir. 1997). In evaluating a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court may consider only the Complaint, exhibits attached to the Complaint, matters of public record, and undisputedly authentic documents if the Plaintiff's claims are based on those documents. *Pension Guaranty Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1992).

Corp. v. Twombly, 127 S.Ct. 1955, 1964–1965 (2007); and

it appearing that Plaintiffs allege (1) that the IFR does not comply with the statutory authorization of 8 U.S.C. § 1101(a)(15)(F)(i); (2) that Defendants acted arbitrarily and capriciously in implementing the IFR; and (3) that Defendants improperly waived the notice and comment requirements of the Administrative Procedure Act ("APA"); and

it appearing that Plaintiffs cannot allege facts establishing that the IFR exceeds the DHS's statutory authorization pursuant to 8 U.S.C. § 1103(a)(3), which grants the Secretary of the DHS the power to "establish such regulations...as he deems necessary for carrying out his authority under the provisions of [the Immigration and Nationality] Act;"[10] and

it appearing that Plaintiffs allege no facts that tend to establish that DHS acted arbitrarily and capri-

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[10] Congress also conferred regulatory 10 authority upon the DHS to set the time period in which nonimmigrants can remain in the country. This means that the DHS is within its authority to promulgate the IFR. "All agencies charged with enforcing and administering a statute have inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion." *Metropolitan Sch. Dist. v. Davila*, 969 F.2d 485, 490 (7th Cir. 1992). See also 8 U.S.C. § 1184(a)(1) ("The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary of Homeland Security] may by regulations prescribe..."). Moreover, courts "give deference to the interpretation of a statute by the agency charged with administering it." *Southern Cal. Edison Co. v. Fed. Energy Reg. Comm'n*, 770 F.2d 779, 782 (9th Cir. 1985).

ciously;[11] and it appearing that Plaintiffs have failed to allege facts beyond a speculative level that tend to establish that DHS acted without good cause in giving the interim IFR immediate effect;[12]

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[11] Pursuant to the Chevron Doctrine, when Congress expressly delegates the authority to make regulations such as these, "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). In their Amended Complaint, Plaintiffs allege that "[t]he implementation of the final rules by the Defendant was arbitrary and capricious..." but fail to provide facts that raise that conclusion above the "speculative level," as required by current legal standards. See Bell Atlantic Corp. 127 S.Ct. at 1964–1965.

[12] Plaintiffs incorrectly allege that DHS provided no justification for giving the IFR immediate effect. In fact, DHS explained that "good cause" was established because delayed implementation would be "contrary to the public interest" for thousands of students whose visas, arranged through OPT, would have expired during public consideration of the IFR. If the IFR had not been given immediate effect through the "good cause" exception, students already holding approved H-1B petitions would have had to terminate employment and either leave the United States or enroll in another course of study to maintain their F-1 status at the end of their OPT terms. Such a situation would have been contrary to the expressed public interest in keeping these qualified graduates from going to other countries to find work in these fields. See 73 Fed. Reg. 18944–18950.

IT IS on this 31st day of October, 2008,

ORDERED that the Motion to Dismiss Plaintiff's First Amended Complaint filed by Defendants DHS and Michael Chertoff is GRANTED; and it is further

ORDERED that Plaintiffs' claims against Defendants are DISMISSED for lack of standing; and it is further

ORDERED that, in the alternative, Plaintiffs' claims are DISMISSED for failure to state a claim upon which relief can be granted; and it is further

ORDERED that this case is CLOSED.

/s/ Faith S. Hochberg

Hon. Faith S. Hochberg, U.S.D.J.

Appendix C—Denial of Preliminary Injunction (Aug. 5, 2008)

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

THE PROGRAMMERS GUILD, INC.; AMERICAN ENGINEERING ASSOCIA-TION; BRIGHT FUTURE JOBS; MICHAEL AMANTI; MARK BLACKBURN; TONI L. CHESTER; DAVID HUBER; JOHN G. MARSON; GENE A. NELSON; P. HARRISON PICOT II; PAUL E. POLAK; MIKE ROTHSCHILD; and ROBERT SANCHEZ,

Plaintiffs,

v.

MICHAEL CHERTOFF in his capacity as Secretary of Homeland Security and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants.

Civil Case No. 08-2666 (FSH)
ORDER and OPINION

Date: August 5, 2008

HOCHBERG, District Judge

This matter comes before the Court upon Plaintiff's application for a preliminary injunction pursuant to Fed. R. Civ. P. 65(a). The Court has reviewed the submissions of the parties and considered the motion on the papers in accordance with Fed. R. Civ. P. 78.

I. BACKGROUND

The Programmers Guild, Inc.; American Engineering Association: Bright Future Jobs: Michael Amanti: Mark Blackburn; Toni L. Chester; David Huber; John G. Marson; Gene A. Nelson; P. Harrison Picot II; Paul

E. Polak; and Mike Rothschild, ("Plaintiffs") are a group of three representative organizations and ten individuals trained in computer programming and engineering. Plaintiffs bring this motion for a preliminary injunction to enjoin Defendants, the Department of Homeland Security ("DHS") and Secretary of DHS, Michael Chertoff, from implementing an Interim Final Rule ("IFR"), which extends the period of time technically-trained students may remain within the United States as lawful nonimmigrants[1] while participating in the Optional Practical Training ("OPT") program. The IFR, adopted by the DHS on April 8, 2008, provides for eligible alien students with degrees in mathematics, engineering, science, or technology disciplines who are applying for H-1B[2] visas to work under an F-1[3] student visa for 29 months.

Prior to the promulgation of the IFR, the DHS had limited OPT to 12 months. See 8 C.F.R. § 214.2(f)(11)(207). The IFR allows for eligible graduates to apply to the United States Citizenship and Immigration Services ("USCIS") for an extension of post-completion OPT for an additional 17 months. The government has changed these time periods in the past: a

[1] See 8 U.S.C. § 101(a)(15)(F)(i).

[2] An H-1B visa is a temporary visa for guest workers in specialty occupations, valid up to 6 years. 8 U.S.C. § § 1101(a)(15)(H); 1182(g)(4).

[3] An F-1 nonimmigrant is defined at 8 U.S.C. § 1101(a)(15)(F) as an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with [8 U.S.C. § 1184(1)] at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States...

maximum of 18 months in 1947; a maximum of 12 months in 2007; and, under the challenged provision, a maximum of 29 months in 2008. Consequently, Defendants argue that the IFR did not create a new classifica-tion of foreign workers or a new visa category, but instead, increased the period for a long-standing benefit.

Plaintiffs claim that IFR was promulgated by Secretary Chertoff and the DHS without notice and comment, in violation of the Administrative Procedure Act. Plaintiffs further argue that without a preliminary injunction, they will face an immediate increase in job competition from the F-1 guest workers in the competi-tive industries of engineering and computers. According to Plaintiffs, the grant of the injunction would not cause any irreparable harm to Defendants, who do not have an interest in the promulgation of the IFR. Lastly, Plaintiffs contend that the injunction is in the public interest of protecting the jobs and wages of U.S. workers and ensuring that Defendants follow procedures under the Administrative Procedure Act.

II. STANDARD FOR PRELIMINARY INJUNCTION

The Supreme Court has stated that "a preliminary injunction is 'an extraordinary and drastic remedy'; it is never awarded as of right." *Munaf v. Geren*, __ U.S. __, 128 S. Ct. 2207, 2219 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, p. 129 (2d ed. 1995)). The Third Circuit has held that to obtain a preliminary injunction, the moving party must demonstrate:

(1) the reasonable probability of eventual success in the litigation and

(2) that the movant will be irreparably injured pendent lite if relief is not granted. Moreover, while the

burden rests upon the moving party to make these two requisite showings, the district court 'should take into account, when they are relevant,

(3) the possibility of harm to other interested persons from the grant or denial of the injunction, and

(4) the public interest.

Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989). In the current case, Plaintiffs have the burden of establishing the that they satisfy the requirements for a preliminary injunction.

III. DISCUSSION

A. Plaintiffs fail to demonstrate likelihood of success on the merits.

To prevail on their motion for a preliminary injunction, Plaintiffs must demonstrate a likelihood of success on the merits. The Supreme Court has stated,

> Review of a preliminary injunction 'is not confined to the act of granting the in-junctio[n], but extends as well to determining whether there is any insuperable objection, in point of jurisdiction or merits, to the maintenance of [the] bill, and if so, to directing a final decree dismissing it.'

Id. at 2219 (quoting *City and County of Denver v. New York Trust Co.*, 229 U.S. 123, 136 (1913) (alteration in original). In the current case, the government argues that Plaintiffs lack standing.[4] Though the Court will permit further briefing before making a final determination of Plaintiffs' standing, the serious questions related to standing cast doubt on Plaintiffs'

[4] The Court does not decide standing issue in this opinion; the Court today issues an Order to Show Cause why the case should not be dismissed for lack of standing.

likelihood of success. Instead of alleging a concrete injury, Plaintiffs assert a generalized grievance with a particular government policy. Courts have consistently held that

> a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 574 (1992).[5] Plaintiffs claim that by promulgating the IFR, the DHS threatens the jobs and wages of U.S. citizens. However, this allegation expresses a general dissatisfaction with the DHS policy towards employment of nonimmigrant visa holders. The complaint also seeks relief that no more directly benefits Plaintiffs than it does the public at large. Thus, the Plaintiffs' claim suffers from serious potential standing problems.

In addition, Plaintiffs are unlikely to succeed on their claim because the DHS had authority to promul-

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[5] *See Allen v. Wright*, 468 U.S. 737, 754 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 483 (1982) ("assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning"); *see also Lujan*, 504 U.S. at 575 (quoting *United States v. Richardson*, 418 U.S. 166, 171, 176-77 (1974)) (where plaintiffs, who sued the government for an alleged constitutional violation of failure to disclose expenditures, raised an impermissible "generalized grievance" that was inconsistent with "the framework of Article III" because "the impact on [plaintiffs was] plainly undifferentiated" and "common to all members of the public").

gate the IFR. Congress granted the Secretary of the DHS statu-tory authority to "establish such regulations...as he deems necessary for carrying out his authority under the provisions of [the Immigration and Nationality] Act." 8 U.S.C. § 1103(a)(3). Congress also conferred regulatory authority upon the DHS to set the time period in which nonimmigrants can remain in the country.[6] This means that the DHS is within its authority to promulgate the IFR. "All agencies charged with enforcing and administering a statute have inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion." *Metropolitan Sch. Dist. v. Davila*, 969 F.2d 485, 490 (7th Cir. 1992). Courts "give deference to the interpretation of a statute by the agency charged with administering it." *Southern Cal. Edison Co. v. Fed. Energy Reg. Comm'n*, 770 F.2d 779, 782 (9th Cir. 1985). The practice of giving discretion to agencies further undermines Plaintiffs' complaint against the DHS.[7]

B. Plaintiffs fail to demon strate irreparable harm.

Plaintiffs also fail to show that they will be irreparably harmed if the preliminary injunction is not

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[6] See 8 U.S.C. § 1184(a)(1) "The admission to the United States 6 of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary of Homeland Security] may by regulations prescribe...")

[7] Congress has also incorporated OPT into its own interpretation of the Immigration and Nationality Act by repeatedly re-enacting the Act after OPT was implemented. See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") Given that various forms of OPT have been part of the immigration policy for 60 years, Plaintiffs' claim that DHS is creating a "guest worker program" is not likely to succeed.

granted. The Third Circuit has held that "a failure to show a like-lihood of success or a failure to demonstrate irreparable injury must necessarily re-sult in the denial of a preliminary injunction." *Instant Air Freight Co. v. C. F. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir. 1989) (quoting *In re Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137, 1143 (3d Cir. 1982).

In the present case, Plaintiffs claim irreparable harm from the admission of alien guest workers because of its alleged impact upon Plaintiffs' employment opportuni-ties and compensation. Plaintiffs' complaint, however, does not show irreparable injury, but instead, attacks the underlying policy of the IFR. Plaintiffs contend they are harmed each day they are not able to work in a job filled by an OPT employee, and the IFR compounds the injury to them as well as other U.S. workers. Plaintiffs state that the United States approved 330,000 H1-B visas for computer workers between 1999 and 2005 and 95,925 H-1B visas for engineers. Plaintiffs attribute the decline in employment in engineering and computer fields to the amount of nonimmigrant workers allowed by the DHS.

Plaintiffs further argue that the IFR allowing more guest workers would have an even greater adverse effect upon the jobs of American workers. This argument, however, attacks the underlying DHS policy of nonimmigrant employment, rather than addressing an irreparable harm faced by Plaintiffs. In addition, the DHS projects that the IFR will allow 12,000 students to apply for an OPT extension. In-terim Final Rule, 73 Fed. Reg. at 18951. These applications represent 0.2% of the 5.5 million jobs in computer and engineering fields in the United States in 2006. The students within the OPT who seek H-1B visas are al-

ready included in the total number of H-1B petitioners previously established by the DHS. Thus, the 12,000 applications will be a subset of the 163,000 petitions set for fiscal year 2009.[8]

A lack of causal connection between Plaintiffs' alleged injury and DHS action fur-ther undermines Plaintiffs' claim of irreparable harm. The extension of OPT eligi-bility by 17 months through the IFR did not cause Plaintiffs' unemployment or under-employment. As the government argues, Plaintiffs may find adequate employment tomorrow or next week. Finally, even if there was a nexus between Plaintiffs' injury and DHS action, the injury still is not "irreparable" to qualify for injunctive relief because it is economic harm compensable in damages.[9] Therefore, Plaintiffs fail to adequately demonstrate irreparable harm if the preliminary injunction is not granted.

C. Granting a preliminary injunction would harm other interested parties.

The grant of the preliminary injunction would create a possibility of harm to other interested persons. Although Plaintiffs contend that the injunction would not cause irreparable harm to the Defendants, the

[8] See "USCIS Releases Preliminary Numbers of FY2009 H-1B Cap 8 Filings" (Apr. 10, 2008), *available at* www.uscis.gov.

[9] *See Adams v. Freedom Forge Corp.*, 204 F.3d 475, 485 (3d Cir. 2000) ("The irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot adequately be compensated after the fact by monetary damages"); *see also Morton v. Beyer*, 822 F.2d 364, 371–72 (3d Cir. 1987) (holding that plaintiff claiming unlawful discharge, and consequently, irreparable harm, was not entitled to a preliminary injunction because the nature of plaintiff's remedy was "purely economic in nature and thus compensable in money").

technically-trained students who are law-fully present in the United States would suffer hardships. The students would have to leave the country to apply for an H-1B visa. Furthermore, eligibility for OPT depends on a student's maintaining lawful status.[10] The grant of a preliminary injunction would harm these students by forcing them to be classified as out-of-status. Such harm must be taken into account before issuing a preliminary injunction.

D. A preliminary injunction would not serve the public interest.

Lastly, Plaintiffs maintain that granting the preliminary injunction is consistent with the public interest in preserving jobs and wages for American workers. There are, however, competing interests. As discussed in the previous section, a prelimi-nary injunction would cause extreme hardships to lawfully present guest students, such as being forced out-of-status and facing deportation. In addition, the govern-ment points out that third parties and members of the public would be harmed if the guest workers were stripped of lawful status. The predictable guest worker system would turn into one of confusion and unpredictability because neither the employers nor the guest workers would know the length of time the nonimmigrants were eligible for working.

The government also has a compelling interest in being able to create necessary extensions to ease rigid

[10] See 8 U.S.C. § 1258(a) ("The Secretary of Homeland Security may, under such conditions as he may prescribe, authorize a change from any nonimmigrant classification to any other nonimmigrant classification in the case of any alien lawfully admitted to the United States as a nonimmigrant who is continuing to maintain that status...).

time line requirements in order to maximize the efficiency of its programs. Since the federal government has the "responsibility...to regulate immigration," it is essential to allow it a degree of flexibility to do so. *In re Alien Children Education Litigation*, 501 F. Supp. 544, 549 (S.D. Tex. 1980). The Supreme Court has stated:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide va-riety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judi-ciary...[There is a] need for flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication.

Mathews v. Diaz, 426 U.S. 67, 81 (1976). In the instant case, the DHS has identified a need for extending the post-OPT period and promulgating the IFR. The administrative and practical purposes that underlie the IFR support giving deference to the DHS in implementing its immigration program.

IV. CONCLUSION

Although there are public interest arguments on the sides of both Plaintiffs and the DHS, Plaintiffs clearly fail the first three prongs of the test for a preliminary in-junction. For the reasons given above, the motion for a preliminary injunction is denied. The Court also is concerned about whether Plaintiffs have standing to bring this case. Standing is an issue that

courts properly raise sua sponte at the outset of an action. *See, e.g., Munaf v. Geren*, __ U.S. __, 128 S. Ct. 2207 (2008) (calling for sua sponte dismissal). For this reason, Magistrate Judge Shwartz has permitted an expedited period of discovery related to standing, which shall not be extended. The-reafter, the Court orders the parties to brief whether this case should be dismissed for lack of standing.

ACCORDINGLY IT IS on this 5th day of August, 2008

ORDERED that Plaintiffs' Motion for Preliminary Injunction is DENIED; and it is further

ORDERED that both parties brief by November 14, 2008 whether this case should be dismissed lack of standing; and it is further

ORDERED that both parties shall have the opportunity to respond to the submissions by November 21, 2008.

/s/ Faith S. Hochberg

Hon. Faith S. Hochberg, U.S.D.J.

Appendix D—Denial of Rehearing (Aug. 17, 2009)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

08-4642

THE PROGRAMMERS GUILD, INC.; AMERICAN ENGINEERING ASSOCIATION, INC.; BRIGHT FUTURE JOBS; MICHAEL AMANTI; MARK BLACKBURN; TONI L. CHESTER; DAVID HUBER; JOHN G. MARSON; HARRISON PICOT, II; PAUL E. POLAK; MIKE ROTHSCHILD; ROBERT SANCHEZ; STEPHEN BERRY; TEPHANIE M. BERRY,

Appellants

v.

MICHAEL CHERTOFF, In his capacity as Secretary of Homeland Security, United States Department of Homeland Security; UNITED STATES DEPARTMENT OF HOMELAND SECURITY

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN Circuit Judges, and DIAMOND, District Judge*

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* As to panel rehearing only.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

MICHAEL A. CHAGARES
Circuit Judge

DATED: August 17, 2009

CRG/cc: John M. Miano, Esq.
Michael M. Hethmon, Esq.
Samuel P. Go, Esq.

Appendix E—Student Visa Regulations Related to Optional Practical Training

8 C.F.R. 214.2(f) Students in colleges, universities, seminaries, conservatories, academic high schools, elementary schools, other academic institutions, and in language training programs—

[...]

(5) Duration of status—(i) General. Except for border commuter students covered by the provisions of paragraph (f)(18) of this section, an F–1 student is admitted for duration of status. Duration of status is defined as the time during which an F–1 student is pursuing a full course of study at an educational institution approved by the Service for attendance by foreign students, or engaging in authorized practical training following completion of studies, except that an F–1 student who is admitted to attend a public high school is restricted to an aggregate of 12 months of study at any public high school(s). An F–1 student may be admitted for a period up to 30 days before the indicated report date or program start date listed on Form I–20. The student is considered to be maintaining status if he or she is making normal progress toward completing a course of study.

[...]

(vi) Extension of duration of status and grant of employment authorization.

(A) The duration of status, and any employment authorization granted under 8 CFR 274a.12(c)(3)(i)(B) and (C) of an F–1 student who is the beneficiary of an H–1B petition and request for change of status shall be automatically extended until October 1 of the fiscal year for which such H–1B visa is being requested where such petition:

(1) Has been timely filed; and (2) States that the employment start date for the F–1 student is October 1 of the following fiscal year.

(B) The automatic extension of an F–1 student's duration of status and employment authorization under paragraph (f)(5)(vi)(A) of this section shall immediately terminate upon the rejection, denial, or revocation of the H–1B petition filed on such F–1 student's behalf. (C) In order to obtain the automatic extension of stay and employment authorization under paragraph (f)(5)(vi)(A) of this section, the F–1 student, according to 8 CFR part 248, must not have violated the terms or conditions of his or her nonimmigrant status. (D) An automatic extension of an F–1 student's duration of status under paragraph (f)(5)(vi)(A) of this section also applies to the duration of status of any F–2 dependent aliens.

[...]

(6) Full course of study—(i) General. Successful completion of the full course of study must lead to the attainment of a specific educational or professional objective. A course of study at an institution not approved for attendance by foreign students as provided in § 214.3(a)(3) does not satisfy this requirement. A "full course of study" as required by section101(a)(15)(F)(i) of the Act means:

(A) Postgraduate study or postdoctoral study at a college or university, or undergraduate or postgraduate study at a conservatory or religious seminary, certified by a DSO [Designated School Official] as a full course of study;

(B) Undergraduate study at a college or university, certified by a school official to consist of at least twelve semester or quarter hours of instruction per academic term in those institutions using standard

semester, trimester, or quarter hour systems, where all undergraduate students who are enrolled for a minimum of twelve semester or quarter hours are charged full-time tuition or are considered full-time for other administrative purposes, or its equivalent (as determined by the district director in the school approval process), except when the student needs a lesser course load to complete the course of study during the current term;

(C) Study in a postsecondary language, liberal arts, fine arts, or other non-vocational program at a school which confers upon its graduates recognized associate or other degrees or has established that its credits have been and are accepted unconditionally by at least three institutions of higher learning which are either: (1) A school (or school system) owned and operated as a public educational institution by the United States or a State or political subdivision thereof; or (2) a school accredited by a nationally recognized accrediting body; and which has been certified by a designated school official to consist of at least twelve clock hours of instruction a week, or its equivalent as determined by the district director in the school approval process;

(D) Study in any other language, liberal arts, fine arts, or other nonvocational training program, certified by a designated school official to consist of at least eighteen clock hours of attendance a week if the dominant part of the course of study consists of classroom instruction, or to consist of at least twenty-two clock hours a week if the dominant part of the course of study consists of laboratory work; or

(E) Study in a curriculum at an approved private elementary or middle school or public or private academic high school which is certified by a designated school official to consist of class attendance

for not less than the minimum number of hours a week prescribed by the school for normal progress toward graduation.

(F) Notwithstanding paragraphs (f)(6)(i)(A) and (f)(6)(i)(B) of this section, an alien who has been granted employment authorization pursuant to the terms of a document issued by the Commissioner under paragraphs (f)(9)(i) or (f)(9)(ii) of this section and published in the FEDERAL REGISTER shall be deemed to be engaged in a "full course of study" if he or she remains registered for no less than the number of semester or quarter hours of instruction per academic term specified by the Commissioner in the notice for the validity period of such employment authorization.

(G) For F–1 students enrolled in classes for credit or classroom hours, no more than the equivalent of one class or three credits per session, term, semester, trimester, or quarter may be counted toward the full course of study requirement if the class is taken online or through distance education and does not require the student's physical attendance for classes, examination or other purposes integral to completion of the class. An on-line or distance education course is a course that is offered principally through the use of television, audio, or computer transmission including open broadcast, closed circuit, cable, microwave, or satellite, audio conferencing, or computer conferencing. If the F–1 student's course of study is in a language study program, no on-line or distance education classes may be considered to count toward a student's full course of study requirement.

(H) On-campus employment pursuant to the terms of a scholarship, fellowship, or assistantship is

deemed to be part of the academic program of a student otherwise taking a full course of study.

[...]

(10) Practical training. Practical training may be authorized to an F–1 student who has been lawfully enrolled on a full time basis, in a Service-approved college, university, conservatory, or seminary for one full academic year. This provision also includes students who, during their course of study, were enrolled in a study abroad program, if the student had spent at least one full academic term enrolled in a full course of study in the United States prior to studying abroad. A student may be authorized 12 months of practical training, and becomes eligible for another 12 months of practical training when he or she changes to a higher educational level. Students in English language training programs are ineligible for practical training. An eligible student may request employment authorization for practical training in a position that is directly related to his or her major area of study. There are two types of practical training available:

[...]

(ii) Optional practical training.

(A) General. Consistent with the application and approval process in paragraph (f)(11) of this section, a student may apply to USCIS for authorization for temporary employment for optional practical training directly related to the student's major area of study. The student may not begin optional practical training until the date indicated on his or her employment authorization document, Form I–766. A student may be granted authorization to engage in temporary employment for optional practical training:

(1) During the student's annual vacation and at other times when school is not in session, if the student is currently enrolled, and is eligible for registration and intends to register for the next term or session;

(2) While school is in session, provided that practical training does not exceed 20 hours a week while school is in session; or

(3) After completion of the course of study, or, for a student in a bachelor's, master's, or doctoral degree program, after completion of all course requirements for the degree (excluding thesis or equivalent). Continued enrollment, for the school's administrative purposes, after all requirements for the degree have been met does not preclude eligibility for optional practical training. A student must complete all practical training within a 14-month period following the completion of study, except that a 17-month extension pursuant to paragraph (f)(10)(ii)(C) of this section does not need to be completed within such 14-month period.

(B) Termination of practical training. Authorization to engage in optional practical training employment is automatically terminated when the student transfers to another school or begins study at another educational level.

(C) 17-month extension of post-completion OPT for students with a science, technology, engineering, or mathematics (STEM) degree. Consistent with paragraph (f)(11)(i)(C) of this section, a qualified student may apply for an extension of OPT while in a valid period of post-completion OPT. The extension will be for an additional 17 months, for a maximum of 29 months of OPT, if all of the following requirements are met.

(1) The student has not previously received a 17-month OPT extension after earning a STEM degree.

(2) The degree that was the basis for the student's current period of OPT is a bachelor's, master's, or doctoral degree in one of the degree programs on the current STEM Designated Degree Program List, published on the SEVP Web site at http://www.ice.gov/sevis.

(3) The student's employer is registered in the E-Verify program, as evidenced by either a valid E-Verify company identification number or, if the employer is using a designated agent to perform the E-Verify queries, a valid EVerify client company identification number, and the employer is a participant in good standing in the E-Verify program, as determined by USCIS.

(4) The employer agrees to report the termination or departure of an OPT employee to the DSO at the student's school or through any other means or process identified by DHS if the termination or departure is prior to end of the authorized period of OPT. Such reporting must be made within 48 hours of the event. An employer shall consider a worker to have departed when the employer knows the student has left the employment or if the student has not reported for work for a period of 5 consecutive business days without the consent of the employer, whichever occurs earlier.

(D) Action of the DSO-Non SEVIS schools. In making a recommendation for practical training, a designated school official must:

(1) Certify on Form I–538 that the proposed employment is directly related to the student's

major area of study and commensurate with the student's educational level;

(2) Endorse and date the student's Form I–20 ID to show that practical training in the student's major field of study is recommended "full-time (or part-time) from (date) to (date)"; and (3) Return to the student the Form I–20 ID and send to the Service data processing center the school certification on Form I–538.

(E) Periods of unemployment during post-completion OPT. During post-completion OPT, F–1 status is dependent upon employment. Students may not accrue an aggregate of more than 90 days of unemployment during any post-completion OPT carried out under the initial post-completion OPT authorization. Students granted a 17-month OPT extension may not accrue an aggregate of more than 120 days of unemployment during the total OPT period comprising any post-completion OPT carried out under the initial postcompletion OPT authorization and the subsequent 17-month extension period.

Appendix F—Optional Practical Training Regulation Changes (April 8, 2008)

DEPARTMENT OF HOMELAND SECURITY
8 CFR Parts 214 and 274a
[DHS No. ICEB–2008–0002; ICE No. 2124–08]
RIN 1653–AA56

Extending Period of Optional Practical Training by 17 Months for F–1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F–1 Students With Pending H–1B Petitions

AGENCY: U.S. Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services; DHS.

ACTION: Interim final rule with request for comments.

SUMMARY: Currently, foreign students in F–1 nonimmigrant status who have been enrolled on a full-time basis for at least one full academic year in a college, university, conservatory, or seminary certified by U.S. Immigration and Custom Enforcement's (ICE's) Student and Exchange Visitor Program (SEVP) are eligible for 12 months of optional practical training (OPT) to work for a U.S. employer in a job directly related to the student's major area of study. This interim final rule extends the maximum period of OPT from 12 months to 29 months for F–1 students who have completed a science, technology, engineering, or mathematics (STEM) degree and accept employment with employers enrolled in U.S. Citizenship and Immigration Services' (USCIS') E-Verify employment verification program. This interim rule requires F–1 students with an approved OPT extension to report

changes in the student's name or address and changes in the employer's name or address as well as periodically verify the accuracy of this reporting information. The rule also requires the employers of F–1 students with an extension of postcompletion OPT authorization to report to the student's designated school official (DSO) within 48 hours after the OPT student has been terminated from, or otherwise leaves, his or her employment with that employer prior to end of the authorized period of OPT.

This rule also ameliorates the socalled "cap-gap" problem by extending the authorized period of stay for all F– 1 students who have a properly filed H– 1B petition and change of status request (filed under the cap for the next fiscal year) pending with USCIS. If USCIS approves the H–1B petition, the students will have an extension that enables them to remain in the United States until the requested start date indicated in the H–1B petition takes effect. This interim final rule also implements a programmatic change to allow students to apply for OPT within 60 days of concluding their studies.

DATES: This interim final rule is effective April 8, 2008. Written comments must be submitted on or before June 9, 2008.

ADDRESSES: You may submit comments, which must be identified by Department of Homeland Security docket number ICEB–2008–0002, using one of the following methods:

• Federal Rulemaking Portal: http:// www.regulations.gov. Follow the instructions for submitting comments.

• Mail: Office of Policy, U.S. Immigration and Customs Enforcement, Department of Homeland Secu-

rity, 425 I Street, NW., Room 7257, Washington, DC 20536.

• Hand Delivery/Courier: The address for sending comments by hand delivery or courier is the same as that for submitting comments by mail. Contact telephone number is (202) 514–8693.

• Facsimile: Comments may be submitted by facsimile at (866) 466– 5370.

Viewing Comments: Comments may be viewed online at http:// www.regulations.gov or in person at U.S. Immigration and Customs Enforcement, Department of Homeland Security, Chester Arthur Building, 425 I Street, NW., Room 7257, Washington, DC 20536. You must call telephone number (202) 514-8693 in advance to arrange an appointment.

Public Participation

This is an interim final rule with a request for public comment. The most helpful comments reference the specific section of the rule using section number, explain the reason for any recommended change, and include data, information, and the authority that supports the recommended change.

Instructions: All submissions must include the agency name and Department of Homeland Securitydocket number ICEB–2008–0002. All comments (including any personal information provided) will be postedwithout change to http://www.regulations.gov. See ADDRESSES above for methods to submit comments. Mailed submissions may be paper, disk, or CD–ROM.

FOR FURTHER INFORMATION CONTACT:
Louis Farrell, Director, Student and
Exchange Visitor Program; U.S.
Immigration and Customs Enforcement,

Department of Homeland Security;
Chester Arthur Building, 425 I Street, NW., Suite 6034, Washington, DC 20536;
telephone number (202) 305–2346. This is not a toll-free number. Program information can be found at http://www.ice.gov/sevis/.

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List of Subjects in 8 CFR Part 214

TABLE OF ABBREVIATIONS

Abbreviation	Amplification
APA	Administrative Procedure Act
ASC	Application Support Center
CEU	Compliance Enforcement Unit
CBP	U.S. Customs and Border Protection
CFR	Code of Federal Regulations
DHS	Department of Homeland Security
DSO	Designated School Official
EAD	Form I–766, Employment Authorization Document
ICE	U.S. Immigration and Customs Enforcement
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act of 1996
INA	Immigration and Nationality Act of 1952, as amended
INS	Immigration and Naturalization Service
OMB	Office of Management and Budget
OPT	Optional Practical Training
RFA	Regulatory Flexibility Act
SEVIS	Student and Exchange Visitor Information System
SEVP	Student and Exchange Visitor Program
STEM	Science, Technology, Engineering, or Math
U.S.	United States
USA PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act
USCIS	U.S. Citizenship and Immigration Services

I. Background and Purpose

A. Optional Practical Training and Need To Extend by 17 Months for F–1 Students With STEM Degrees

Section 101(a)(15)(F)(i) of the Immigration and Nationality Act of 1952, as amended (INA), 8 U.S.C. 1101(a)(15)(F)(i), establishes the F–1 nonimmigrant classification for individuals who wish to come to the United States temporarily to attend an academic or language training institution certified by the Student and Visitor Exchange Program (SEVP) for U.S. Immigration and Customs Enforcement (ICE). F–1 students may remain in the United States for the duration of their educational programs if they otherwise maintain status. 8 CFR 214.2(f)(5). Once an F–1 student has completed his or her course of study, and any authorized practical training following completion of studies, the student must either transfer to another SEVP-certified school to continue studies, change to a different nonimmigrant status, otherwise legally extend their period of authorized stay in the United States, or leave the United States. 8 CFR 214.2(f)(5)(iv). F–1 students are allowed 60 days after the completion of such studies and practical training to prepare for departure from the United States. 8 CFR 214.2(f)(5)(iv).

F–1 students generally are not authorized to work in the United States during the term of their educational program, with limited exceptions. Currently, students in F–1 nonimmigrant status who have been enrolled on a full-time basis for at least one full academic year in a college, university, conservatory, or seminary certified by SEVP, and have otherwise maintained status, are eligible to apply for up to 12 months of optional practical training (OPT) to work for a U.S. employer in a job directly related to the student's major area of study. 8 CFR 214.2(f)(10). F–1 students may obtain OPT either during their educational program ("pre-completion OPT") or after the

student graduates ("postcompletion OPT"). The student remains in F–1 status throughout the OPT period.

An F–1 student in post-completion OPT, therefore, does not have to leave the United States within 60 days after graduation, but is authorized to remain in the United States for the entire postcompletion OPT period. If the student has not used any pre-completion OPT, then the student's post-completion OPT period could be up to 12 months. Once the post-completion OPT period has concluded, the student must depart the United States within 60 days, unless he or she changes status or otherwise legally extends his or her stay in the United States (e.g., starts a graduate program).

During his or her authorized period of stay, a qualified F–1 student may receive a change of nonimmigrant status to H–1B nonimmigrant status if an employer has timely filed, and USCIS grants, a petition on behalf of that student. The employer must submit a Form I–129, Petition for a Nonimmigrant Worker to USCIS. The Form includes a section for the employer to indicate whether change of status is being requested for the beneficiary (if eligible), or whether the beneficiary will instead apply for a visa outside of the United States at a U.S. consulate. USCIS may grant H–1B status to eligible nonimmigrants employed in or offered a job by the petitioner in a specialty occupation. 8 CFR 214.2(h)(1)(ii)(B). A specialty occupation is one that requires the theoretical and practical application of a body of specialized knowledge and a bachelor's or higher degree in the specific specialty as a minimum qualification. INA Section 214(i).

Congress, however, has prohibited USCIS from granting H–1B status to more than 65,000 nonimmi-

grant aliens during any fiscal year (referred to as the "cap").[1] See INA Section 214(g). The H–1B category is greatly oversubscribed.

When USCIS determines that the cap will be reached for that fiscal year, based on the number of H–1B petitions received, it announces to the public the final day on which USCIS will accept such petitions for adjudication in that fiscal year. USCIS refers to this day as the "final receipt date." See 8 CFR 214.2(h)(8)(ii)(B). USCIS then randomly selects from among the petitions received on the final receipt date the number of petitions necessary to reach the 65,000 cap. *Id.* If the final receipt date falls within the first five business days on which petitions subject to the applicable cap may be filed, USCIS will randomly select the number of petitions necessary to reach the 65,000 cap from among those filed during the acceptance period.

There is a significant amount of competition among employers of highly skilled workers for the limited number of H–1B visas available each fiscal year. Each year, the cap has been reached earlier in the year. For FY05, the cap was reached on October 1, 2004, the first day of that fiscal year. In FY06, the cap was reached on August 10, 2005; and in FY 07, the cap

[1] The 65,000 person cap does not, however, apply to certain limited classes of aliens, including individuals who are employed by, or have received offers of employment at: (1) An institution of higher education, or a related or affiliated nonprofit entity, or (2) a nonprofit research organization or a governmental research organization. Additionally, there is an exemption from the H–1B cap for up to 20,000 individuals who are advanced degree graduates (master's degree or higher) from U.S. institutions of higher education.

was reached on May 26, 2006. Last year, the cap was reached on April 2, 2007, the first business day for filing. On that single day, USCIS received more than twice the number of petitions needed to reach the cap for that fiscal year.[2]

Many employers who hire F–1 students under the OPT program eventually file a petition on the students' behalf for classification as an H–1B worker in a specialty occupation. If the student is maintaining his or her F–1 nonimmigrant status, the employer may also include a request to have the student's nonimmigrant status changed to H–1B. Because the H–1B category is greatly oversubscribed, however, OPT employees often are unable to obtain H– 1B status within their authorized period of stay in F–1 status, including the 12-month OPT period, and thus are forced to leave the country. The inability of U.S. employers, in particular in the fields of science, technology, engineering and mathematics, to obtain H–1B status for highly skilled foreign students and foreign nonimmigrant workers has adversely affected the ability of U.S. employers to recruit and retain skilled workers and creates a competitive disadvantage for U.S. companies.

The National Science Foundation (NSF), in its Science and Engineering Indicators 2008 (SEIND08),[3] took note of these trends. NSF observed that globalization of science and technology has proceeded at a quick pace since the early 1990s. Increased international travel coincided with the development of the Internet as a tool for unfettered worldwide information dissemination and communication. "By the late

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[2] See USCIS Update at http://www.uscis.gov/files/pressrelease/H1BFY08Cap040307.pdf.

[3] This publication may be found at http://www.nsf.gov/statistics/seind08.

1990s," the report continues "many governments had taken note of these developments. They increasingly looked to the development of knowledgeintensive economics for their countries' economic competitiveness and growth." SEIND08 at 0–4. NSF further reports that "twenty-five percent of all college education science and engineering occupations in 2003 were foreign born, as were [forty percent] of doctorate holders in science and engineering." According to the Task Force on the Future of American Innovation, *Measuring the Moment: Innovation, National Security and Economic Competitiveness* (November 2006),[4] the proportion of American students in the United States obtaining degrees in STEM fields has fallen from 32% to 27%. Later, the report reveals that since 2000, there have been more foreign graduate students studying engineering and the physical, computer and mathematical sciences in U.S. graduate schools than U.S. citizens and permanent residents.

The NSF goes on to say that "U.S. [Gross Domestic Product] growth is robust but cannot match large, sustained increases in China and other Asian economies." And because of this globalization, the United States, while still the leading producer of scientific knowledge, faces a labor market in which it must increasingly compete with these countries. The economies of the Organization of Economic Cooperation and Development (OECD) countries, particularly Australia, Canada, and certain European countries, are also providing increased opportunities for STEM scientists. And STEM graduates from the growing economies of China, India, and Russia, for example, have increased employment opportunities in their na-

[4] This report may be accessed at http://www.futureofinnovation.org/PDF/BII-FINALHighRes-11-14-06_nocover.pdf.

tive countries. Thus, the Task Force on the Future of American Innovation reports "the impact of China and India on global R&D [research and development] is significant and growing rapidly: In 1990, these two countries accounted for 3.4% of foreign R&D staff, which increased to 13.9% by 2004. By the end of 2007, China and India will account for 31% of global R&D staff, up from 19% in 2004." See Measuring the Moment: Innovation, National Security and Economic Competitiveness (November 2006). In short, with their large and growing populations of STEMgraduate scientists, high-tech industries in these three countries and others in the OECD now compete much more effectively against the U.S. high technology industry.

DHS has received communications from a wide range of concerned stakeholders, including companies in the high-tech industry, members of Congress, and U.S. educational institutions, about the adverse impact on the U.S. economy and the ability of U.S. schools to attract talented foreign students for STEM study programs due to the immigration and employment practices in the United States. Representatives of high-tech industries in particular have raised significant concerns that the inability of U.S. companies to obtain H–1B visas for qualified F–1 students in a timely manner continues to result in the loss of skilled technical workers to countries with more lenient employment visa regimes, such as Canada and Australia. See Testimony of Bill Gates, Chairman, Microsoft Corporation, before the U.S. Senate Committee on Health, Education, Labor & Pensions, "Strengthening American Competitiveness for the 21st Century" (Washington. D.C.: March 7, 2007).[5]

[5] A copy of this testimony can be accessed at http://help.senate.gov/hearings/2007_03_07/ Gates.pdf.

Notably, the European Union recently proposed a "Blue Card" program, similar to the U.S. H–1B visa program, under which skilled workers would be able to obtain a temporary work visa for employment in the European Union. Unlike the H–1B program, the European Union's Blue Card program proposal would not have a cap. The European Union estimates that workers would usually be able to obtain their visas in 90 days or less. If the Blue Card proposal is adopted, U.S. employers could be at a competitive disadvantage to employers in the European Union when recruiting foreign national candidates. U.S. high-tech employers are particularly concerned about the H–1B cap because of the critical shortage of domestic science and engineering talent and the degree to which high-tech employers are as a consequence necessarily far more dependent on foreign workers than other industries. *See The National Science Foundation, Rising Above the Gathering Storm: Energizing and Employing America for a Brighter Economic Future (2007), pp. 78–83* (describing the critical shortages of science, math, and engineering talent in the United States).[6]

Many F–1 students who graduated last spring will soon be concluding their 12-month periods of OPT. Unless employers for those students are able to obtain H–1B visas when the filing period commences on April 1, 2008 for FY09 (October 1, 2008), many of these students will need to leave the United States when their current postcompletion OPT period concludes.

This interim final rule addresses the immediate competitive disadvantage faced by U.S. high-tech

[6] This publication may be found at http://www.nap.edu/catalog.php?record_id=11463.

industries, and thus may quickly ameliorate some of the adverse impacts on the U.S. economy. It does this by allowing an F–1 student already in a period of approved postcompletion OPT to apply to extend that period by up to 17 months (for a maximum total period of 29 months of OPT) if the student received a STEM degree. As discussed in Section II below, this extension is only available to F–1 students with STEM degrees who have accepted employment with an employer registered and in good standing with USCIS' E-Verify employment verification program. In addition, employers of F–1 students who qualify for this 17-month extension of post-completion OPT must report to the student's school DSO within 48 hours if the student's employment ends prior to the end of the student's authorized OPT employment period.

B. "Cap-Gap" and Need To Expand Relief to All F–1 Students With Pending H–1B Petitions

As discussed above, nonimmigrant F–1 students on post-completion OPT maintain valid F–1 status until the expiration of the OPT period and the subsequent 60-day departure preparation period. Employers of students already working for the employer under OPT often file petitions to change the students' status to H–1B so that these nonimmigrant aliens may continue working in their current or a similar job. Many times, however, an F–1 student's OPT authorization will expire prior to the student being able to assume the employment specified in the approved H–1B petition.

Currently, an employer may not file, and USCIS may not approve, an H–1B petition submitted earlier than six months before the date of actual need for the beneficiary's services or training. 8 CFR 214.2(h)(9)(i)(B). As a result, the earliest date that an employer can file

an H–1B petition for consideration under the next fiscal year cap is April 1, for an October 1 employment start date. If that H–1B petition and the accompanying change of status request are approved, the earliest date that the student may start H–1B employment is October 1. Consequently, F–1 students who are the beneficiaries of approved H–1B petitions, but whose period of authorized stay (including authorized periods of post-completion OPT and the subsequent 60-day departure preparation period) expires before the October 1 H–1B employment start date, would have a gap in authorized stay and employment. This situation is commonly referred to as the "cap-gap."

An F–1 student in a cap-gap situation would have to leave the United States and return at the time his or her H–1B status becomes effective at the beginning of the next fiscal year. This gap creates a hardship to a number of students and provides a disincentive to remaining in the United States for employment. The cap-gap therefore creates a recruiting obstacle for U.S. employers interested in obtaining F–1 students for employment and submitting H–1B petitions on their behalf. Moreover, when the student is already working for a U.S. company on OPT and has to leave the United States, frequently for several months, during the cap-gap period, the employer suffers a major disruption.

USCIS is already authorized to extend the status of F–1 students caught in a cap-gap between graduation and the start date on his or her approved H–1B petition. 8 CFR 214.2(f)(5)(vi). However, before USCIS can offer students any relief from the cap-gap, it must first determine that the cap has been reached for the current fiscal year, or is likely to be reached prior to the end of the current fiscal year, and then publish

a notice in the **Federal Register** announcing that status is extended for students with pending H–1B petitions. Significantly, the existing regulations do not take into account the fact that the H–1B category is now oversubscribed to such a degree that USCIS' final receipt date for petitions is now announced even before the start of the fiscal year for which the petitions are being submitted and, in the absence of an expansion of the 65,000 cap by Congress, this state of affairs will likely continue indefinitely. The existing regulations, therefore, are not an effective means of addressing the cap-gap problem suffered by student beneficiaries of pending H–1B petitions (and their employers).

This interim rule amends USCIS procedures by eliminating the requirement that USCIS issue a **Federal Register** notice. Instead, this rule extends the authorized period of stay, as well as work authorization, of any F–1 student who is the beneficiary of a timely-filed H–1B petition that has been granted by, or remains pending with, USCIS. The extension of status and work authorization terminates on October 1 of the fiscal year for which the H–1B visa has been requested. This amendment better reflects the reality of the current situation, where demand for H–1B visas is so high that USCIS regularly receives enough petitions to reach the cap before the beginning of the fiscal year for which petitions are filed,and offer more substantial cap gap relief to both students and employers.

II. Discussion of This Interim Final Rule

A. 17-Month Extension of Optional Practical Training for F–1 Students Who Have Obtained a STEM Degree

This interim rule will allow F–1 students who have received a degree in a STEM field to obtain an extension of their existing post-completion OPT period for up to 17 months, for a maximum period of post-completion OPT of 29 months. The extension, however, is only available to students who are employed, or will be employed, by an employer enrolled (and determined by USCIS to be in good standing) in USCIS' E-Verify employment verification program at the time the student applies for the 17-month extension. A student seeking an extension must agree to report to a DSO at his or her school the following: Changes to the student's name, the student's residential and mailing address, the student's employer, and the address of the student's employer. The student must also report to a DSO every six months from the date the OPT extension starts to verify this information. In addition, the employer of a student under extended OPT must report to the student's school DSO within 48 hours after the student leaves employment with that employer. The DSO must report all of this information in SEVIS.

1. Requirements for Students Seeking a 17-Month OPT Extension

This interim final rule will allow qualified F–1 students who currently have approved post-completion OPT to apply for a 17-month extension of OPT. The student's degree, as shown is SEVIS, must be a bachelor's, master's, or doctorate degree with a degree

code that is on the current STEM Designated Degree Program List.

The STEM Designated Degree Program List is based on the "Classification of Instructional Programs" (CIP) developed by the U.S. Department of Education's National Center for Education Statistics (NCES). See Classification of Instructional Programs—2000: (NCES 2002–165) U.S. Department of Education, National Center for Education Statistics. Washington, DC: U.S. Government Printing Office.[7] To be eligible for the 17-month OPT extension, a student must have received a degree in the following:

- Actuarial Science. NCES CIP Code 52.1304
- Computer Science: NCES CIP Codes 11.xxxx (except Data Entry/Microcomputer Applications, NCES CIP Codes 11.06xx)
- Engineering: NCES CIP Codes 14.xxxx
- Engineering Technologies: NCES CIP Codes 15.xxxx
- Biological and Biomedical Sciences: NCES CIP Codes 26.xxxx
- Mathematics and Statistics: NCES CIP Codes 7.xxxx
- Military Technologies: NCES CIP Codes 29.xxxx
- Physical Sciences: NCES CIP Codes 40.xxxx
- Science Technologies: NCES CIP Codes 41.xxxx
- Medical Scientist (MS, PhD): NCES CIP Code 51.1401

The approved list is available on SEVP's Web site at http://www.ice.gov/sevis. DHS welcomes comment on the list and any recommendations for additional degrees that the Department should consider for in-

[7] This publication may be found at http://nces.ed.gov/pubs2002/2002165_2.pdf.

clusion in the list. DHS will continue to work with interested parties to evaluate the degrees that may be added to this list in the future, and will be reaching out to other agencies in the development of the final rule. The Department, however, must also continue to ensure that the extension remains limited to students with degrees in major areas of study falling within a technical field where there is a shortage of qualified, highly-skilled U.S. workers and that is essential to this country's technological innovative competitiveness.

DHS will announce any future changes to the list on this Web site. Note that catch-all NCES CIP codes ending in "99" are not considered STEM designated degrees.

Students who wish to extend OPT must request that their DSO recommend the 17-month OPT extension. DSOs recommending the extension must verify the student's eligibility, certifythat the student's degree is on the STEM Designated Degree Program List, and ensure that the student is aware of his or her responsibilities for maintaining status while on OPT. The DSO must make the recommendation to extend OPT for the student through SEVP's Student and Exchange Visitor Information System (SEVIS), a Webenabled database for the collection of information related to F, M and J nonimmigrants, certified schools, and State Department approved exchange visitor programs. SEVP will implement an interim update to SEVIS to ensure schools can recommend extending the authorized OPT period for 17 months for qualified students. The changes will be minimal due to the short time for planning and the reduced testing cycle. SEVP is also planning a major SEVIS release in the first part of FY 2009 to more fully support the new

regulatory requirements. SEVP will publish interim instructions for the period between the interim update and the major release and provide training opportunities for DSOs. SEVIS help desk personnel will provide assistance with the proper interim procedures. Once the DSO recommends a student for the extension, the student must submit a Form I–765 and appropriate fees (as indicated in the form instructions) to USCIS. Instructions for filing the Form I–765 can be found at USCIS' Web site at http://www.uscis.gov.

This interim final rule also extends EADs for students with pending requests for extension of postcompletion OPT. An F–1 student who has properly filed Form I–765 prior to the end date of his or her post completion OPT is allowed to maintain continuous employment for up to 180 days while USCIS adjudicates the request for the extension. To implement the changes discussed in this rulemaking, USCIS is making conforming amendments to Form I–765 to ensure that that the F–1 students seeking a 17-month extension of their post-completion OPT are, in fact, eligible to do so. USCIS is amending this form to add, among other things, a new question #17 asking students to identify the degree they have received, so that USCIS may determine that the student has received a degree in a STEM field. The new Form I–765 also will ask the student seeking the extension to provide the name of their employer (as listed in E-Verify), and their employer's E-Verify Company I.D. number or, if the employer is using a Designated Agent to perform the E-Verify queries, a valid EVerify Client Company I.D. number

2. Requirement for Employers of Students With a 17-Month OPT Extension

a. USCIS E-Verify Employment Verification Program

As discussed above, only students who are employed by employers who have enrolled, and are determined by USCIS to be in good standing, in USCIS' E-Verify program will be eligible for the 17-month extension of post-completion OPT. The E-Verify program is an Internet-based system operated by USCIS, in partnership with the Social Security Administration (SSA). E-Verify is currently free to employers and is available in all 50 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands. E-Verify electronically compares information contained on the Employment Eligibility Verification Form I–9 (herein Form I–9) with records contained in SSA and DHS databases to help employers verify identity and employment eligibility of newly-hired employees. This program currently is the best means available for employers to determine employment eligibility of new hires and the validity of their Social Security Numbers.

Before an employer can participate in the E-Verify program, the employer must enter into a Memorandum of Understanding (MOU) with DHS and SSA. This memorandum requires employers to agree to abide by current legal hiring procedures and to ensure that no employee will be unfairly discriminated against as a result of the E-Verify program. Violation of the terms of this agreement by the employer is grounds for immediate termination of its participation in the program.

Employers participating in E-Verify must still complete a Form I–9 for each newly hired employee, as required under current law. Following completion of the Form I–9, the employer must enter the newly hired worker's information into the E-Verify Web site, and that information is then checked against information contained in SSA and USCIS databases. E-Verify compares employee information against more than 425 million records in the SSA database and more than 60 million records stored in the DHS database. Currently, 93 percent of all employer queries are instantly verified as work authorized.

It is important to note that, once an employer enrolls in E-Verify, that employer is responsible for verifying all new hires, including newly hired OPT students with 17-month OPT extensions, at the hiring site(s) identified in the MOU executed by the employer and DHS. New hires must be verified to be authorized to work in the United States through E-Verify within three days of hire. If, however, an employer enrolls in E-Verify to retain the employment of an OPT student, the employer may not verify the employment eligibility of the OPT employee in E-Verify as the MOU prohibits the verification of existing employees. Additional information on enrollment and responsibilities under EVerify can be found at http:// www.uscis.gov/E-Verify.

Employers can register for E-Verify on-line at http:// www.uscis.gov/EVerify. The site provides instructions for completing the MOU needed to officially register for the program.

b. Employer Reporting Requirement

SEVP's ability to track nonimmigrant students in the United States relies on reporting by the students'

DSOs. DSOs obtain the needed information from the school's recordkeeping systems and contact with the students. Students on OPT, however, are often away from the academic environment, making it difficult for DSOs to ensure proper and prompt reporting on student status to SEVP. While DHS regulations currently require DSOs to update SEVIS, the current reporting requirements depend entirely on the student's timely compliance. DSOs are not currently required to review and verify information reported by students on a recurring basis. This combination of factors hinders systematic reporting and SEVP's ability to track F–1 students during OPT.

Accordingly, DHS will only extend post-completion OPT for students employed by employers that agree to report when an F–1 student on extended OPT terminates or otherwise leaves his or her employment with the employer prior to end of the authorized period of OPT. The employer must report this information to the DSO of the student's school no later than 48 hours after the student leaves employment. Employers must report this information to the DSO at the student's school unless DHS announces another means to report such information through a **Federal Register** notice. The contact information for the DSO is on the student's Form I–20. DHS welcomes comments on possible means for directly reporting to DHS, such as through electronic means similar to or associated with the E-Verify platform.

B. Expansion of Cap-Gap Relief for All F–1 Students With Pending H–1B Petitions

Currently, F–1 students who are the beneficiaries of approved H–1B petitions, but whose period of admission (including authorized periods of post-completion OPT and the subsequent 60-day departure prep-

aration period) expires before the H–1B employment start date, have a gap in authorized stay and employment between the end of their F–1 status and the beginning of their H–1B employment. This situation is commonly referred to as the "cap-gap."

USCIS is authorized to extend the status of F–1 students caught in a cap gap between the end of the student's F– 1 status and the start date on his or her approved H–1B petition.[8] 8 CFR 214.2(f)(5)(vi). The current regulations, however, do not provide for a commensurate extension of students' employment authorization to cover the gap period. Additionally, the regulations currently provide that USCIS must determine that the H–1B cap will be met prior to the end of the "current" fiscal year before it may authorize an extension of stay for students subject to the cap gap for that fiscal year by means of a notice published in the **Federal Register**.

This interim rule expands the relief offered by the existing cap gap provision by first eliminating the limitation that cap gap relief be authorized only when the H–1B cap is likely to be reached prior to the end of the current fiscalyear. This interim rule also removes the requirement that USCIS issue a notice in the **Federal Register** to announce the extension of status and instead allows an automatic extension of status and employment authorization for F–1 students with

[8] The current regulations also require that the "Commissioner" issue the notice in the Federal Register. This is a technical error because this regulation has not been updated since the responsibilities of the Commissioner of the former INS were transferred to the Department of Homeland Security in March 2003 under the Homeland Security Act of 2002 Because DHS is removing this provision altogether. there is no need to make the technical correction from "Commissioner" to "Director [of USCIS]" at this time.

pending H–1B petitions. If USCIS denies a pending H–1B petition, the student will have the standard 60-day period (from notification of the denial or rejection of the petition) before they have to leave the United States. Unlike the extension of postcompletion OPT, which is limited to F–1 students who have obtained STEM degrees, the extension of status for F–1 students in a cap-gap applies to all F–1 students with pending H–1B petitions during a fiscal year.

C. Related Changes to the OPT Requirements

1. Changes to Post-Completion OPT

Currently, students must apply for post-completion OPT prior to completing their course requirements. 8 CFR 214.2(f)(10)(ii)(A). This is inconsistent with other regulatory provisions allowing students to transfer, apply for a new degree program, or change to another nonimmigrant status during their 60-day post-completion departure preparation period. Problems also arise if students fail to complete their program after receiving authorization for post-completion OPT. Therefore, this rule allows students to apply for post-completion OPT during the 60-day departure preparation period.

2. Periods of Unemployment During OPT

DHS regulations currently define the period of an F–1 student's status as the time the student is pursuing a full course of study at an SEVP-certified school or engaging in authorized postcompletion OPT. 8 CFR 214.2(f)(5). They do not specify how much time the student may be unemployed, making it difficult to determine when an unemployed student on postcompletion OPT violates the requirements for remaining in F–1 status. As status during OPT is based on the premise that the F–1 student is working, there must

be a limit on unemployment, just as the F–1 student's period in school is based on the premise that he is actually pursuing a full-time course of study, and there are limits on how often the student can reduce his course load. An F–1 student who drops out of school or does not pursue a fulltime course of study loses status; an F–1 student with OPT who is unemployed for a significant period should similarly put his status in jeopardy. Therefore, this rule specifies an aggregate maximum allowed period of unemployment of 90 days for students on 12-month OPT. This maximum period increases by 30 days for F–1 students who have an approved17-month OPT period. In addition to clarifying the student's status, this measure allows time for job searches or a break when switching employers.

III. Regulatory Requirements

A. Administrative Procedure Act

To avoid a loss of skilled students through the next round of H–1B filings in April 2008, DHS is implementing this initiative as an interim final rule without first providing notice and the opportunity for public comment under the "good cause" exception found under the Administrative Procedure Act (APA) at 5 U.S.C. 553(b). The APA provides that an agency may dispense with notice and comment rulemaking procedures when an agency, for "good cause," finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." See 5 U.S.C. 553(b)(B). The exception excuses notice and comment, however, in emergency situations, or where "the delay created by the notice and comment requirements would result in serious damage to important interests." Woods Psychiatric Institute v. United States, 20 Cl. Ct. 324, 333 (1990), aff'd 925 F.2d 1454 (Fed. Cir. 1991); see also National Fed'n of Fed. Employees

v. National Treasury Employees Union, 671 F.2d 607, 611 (D.C. Cir. 1982).

Currently, DHS estimates, through data collected by SEVP's Student and Visitor Exchange Information System (SEVIS), that there are approximately 70,000 F–1 students on OPT in the United States. About one-third have earned a degree in a STEM field. Many of these students currently are in the United States under a valid postcompletion OPT period that was granted immediately prior to the conclusion of their studies last year. Those students soon will be concluding the end of their post-completion OPT and will need to leave the United States unless they are able to obtain an H–1B visa for FY09 or otherwise maintain their lawful nonimmigrant status. DHS estimates that there are 30,205 F–1 students with OPT expiring between April 1 and July 31 of this year. The 17-month extension could more than double the total period of post-completion OPT for F–1 students in STEM fields. Even if only a portion of these students choose to apply for the extension, this extension has the potential to add tens of thousands of OPT workers to the total population of OPT workers in STEM occupations in the U.S. economy.

This interim rule also provides a permanent solution to the "cap-gap" issue by an automatic extension of the duration of status and employment authorization to the beginning of the next fiscal year for F–1 students who have an approved or pending H–1B petition. This provision allows U.S. employers and affected students to avoid the gap in continuous employment and the resulting possible violation of status. This increases the ability of U.S. employers to compete for highly qualified employees and makes the United States more competitive in attracting foreign students. Based on

the historical numbers of "cap-gap" students taking advantage of a **Federal Register** Notice extending F–1 status, ICE estimates that up to 10,000 students will have approved H–1B petitions with FY09 start dates. At the end of their OPT, these students must terminate employment and either depart the United States within 60 days or extend their F–1 status by enrolling in another course of study. Unless this rule, and the cap gap relief it affords, is implemented this Spring, all these students must interrupt their employment and those who leave the United States will not be allowed to return until the October 1, 2008 start date on their H–1B petitions.

The ability of U.S. high-tech employers to retain skilled technical workers, rather than losing such workers to foreign business, is an important economic interest for the United States. This interest would be seriously damaged if the extension of the maximum OPT period to twentynine months for F–1 students who have received a degree in science, technology, engineering, or mathematics is not implemented early this spring, before F–1 students complete their studies and, without this rule in place and effective, would be required to leave the United States.

Accordingly, DHS finds that good cause exists under 5 U.S.C. 553(b) to issue this rule as an interim final rule. DHS nevertheless invites written comments on this interim rule. Further, because this interim final rule relieves a restriction by extending the maximum current post-completion OPT period for certain students from 12 months to up to 29 months, DHS finds that this rule shall become effective immediately upon publication of this interim final rule in the **Federal Register**. 5 U.S.C. 553(d).

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 605(b)), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBRFA), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). RFA analysis is not required when a rule is exempt from notice and comment rulemaking under 5 U.S.C. 553(b). DHS has determined that this rule is exempt from notice and comment rulemaking pursuant to 5 U.S.C. 553(b)(B). An RFA analysis, therefore, is not required for this rule.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This is not a major rule, as defined by Section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the United States economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign- based companies in domestic and export markets.

D. Executive Order 12866

This proposed rule has been designated as a "significant regulatory action" under Executive Order 12866. This rule therefore has been submitted to OMB for review. In addition, under section 6(a)(3)(C) of the Executive Order, DHS has prepared an assessment of the benefits and costs anticipated to occur as a result of this regulatory action and provided the assessment to OMB for review. This assessment is as follows:

Recent numbers: This rule will have an impact on a small percentage of international students in the United States. According to the DHS Office of Immigration Statistics, an average of approximately 642,000 F–1 academic students, at all grade levels, have entered the United States per year in fiscal years 2004, 2005, and 2006.[9]

According to the Institute of International Education, approximately 583,000 of these students are college students.[10] Of those, SEVP records indicate that close to 70,000 students currently participate in OPT and, of those, only about 23,000 are OPT participants who are studying in designated STEM fields. Thus, about 3.6 percent of F–1 students could potentially benefit from this rule. Nonetheless, as shown below, this may be a sufficient number to significantly benefit employers who are in need of workers in STEM-related fields.

OPT extension volume estimate: A reasonable estimate of the number of students who will participate in this new OPT 17-month extension program is difficult for a number of reasons, but DHS estimates that about 12,000 students will apply for an OPT extension after this rule takes effect. Of the 23,000 OPT students, however, about 4,000 have bachelor's degrees, 13,000 have master's degrees, and 6,000 have

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[9] DHS Office of Immigration Statistics, Temporary Admissions of Nonimmigrants to the United States: 2006, "Nonimmigrant Admissions (I–94 Only) by Class of Admission: Fiscal Years 2004 to 2006." Available on line at http://www.dhs.gov/xlibrary/assets/statistics/publications/NI_FR_2006_508_final.pdf.

[10] The Institute of International Education, "International Student and Total U.S. Enrollment" Available on line at: http://opendoors.iienetwork.org/?p=113122.

a doctorate. Anecdotal evidence indicates that foreign students with a master's or bachelor's degrees often continue as students and pursue more advanced degrees. DHS experience indicates that many of these students will be granted H–1B status and will not need an OPT extension, although actual records do not exist on the rates at which F–1 OPT participants actually receive an H–1B position. Additionally, some students will not request an OPT extension because they are returning to their home country, while many students will want to stay. According to a report from the Oak Ridge Institute for Science and Education, 65 percent of 2000 U.S. science and engineering doctoral degree recipients with temporary visas were still in the United States in 2005, up from a 61 percent 5- year stay rate found in 2003.[11] This implies that STEM students stay in the U.S. at a relatively high rate. And, finally, the changes made by this rule are expected to increase the attractiveness of the OPT program. Although a precise estimate of the effect is impossible, the OPT application volume is likely to increase at least a slight amount because of the impact of this rule on program flexibility, length of stay, and students' quality of life. Therefore, after considering these factors, DHS estimates that about 12,000 of the 23,000 students who could apply for the OPT extension allowed by this rule, will apply in an average year after this rule takes effect.

Public Costs

Fees. The fee for Form I–765 is $340. 8 CFR 103.7(b)(1). Thus, the new filing fees to be collected by USCIS from students requesting an employment

[11] Finn, Michael, "Stay Rates of Foreign Doctorate Recipients from U.S. Universities: 2005," Oak Ridge Institute for Science and Education (2007).

authorization document as a result of this rule will be about $4.1 million.[12]

Paperwork burden. The public reporting burden for completion of the Form I–765 information is estimated at 3 hours and 25 minutes per response, including the time for reviewing instructions, completing and submitting the form. As discussed below in the Paperwork Reduction Act section of this rule, this form is being amended to add a space for STEM students to provide their degree, the name of their employer, and their employer's E-Verify Company I.D. number or, if the employer is using a Designated Agent to perform the E-Verify queries, a valid EVerify Company Client Company I.D. Number. Therefore, the 12,000 students requesting OPT will expend approximately 3.42 hours per application for a total of 41,040 burden hours per year.[13] Based on the private industry employer average compensation costs of $28.03 per hour worked,[14] this requirement will result in an estimated total cost of $1.15 million.[15]

New burden. This rule adds to the current regulation's DSO and student reporting requirements. A student with a 17-month extension to postcompletion OPT must also make a validation report to the DSO every six months starting from the date of the extension, within 10 business days, and ending when the student's F–1 status ends, if the student changes edu-

[12] $340 × 12,000 = $4,080,000.

[13] 3.42 hours (25 minutes = .42 hours) × 12,000.

[14] Employer Costs for Employee Compensation, All civilian occupations, 3rd Quarter 2007. U.S. Department of Labor, Bureau of Labor Statistics at http://data.bls.gov/cgi-bin/surveymost. No consideration is given to possibly lower wage rates being applicable for students.

[15] 3.42 hours × 12,000 applications = 41,040. 41,040 × 28.03 = $1,150,351 (rounded).

cational levels at the same school or the student transfers to another school or program. The validation is a confirmation that the student's information in SEVIS is current and accurate. The DSO is responsible for updating the student's record with SEVIS within 21 days. The DSO must also report in SEVIS when the employer of a student with the 17-month OPT extension reports that the student no longer works for that employer.

Also, this rule makes failure to report a basis for terminating the student's status and provides that failure to report can impact the future visa program and OPT eligibility of the school, employer, and student. Further, the school is required by this rule to report to SEVIS whether there have been any changes in the student's circumstances or not. Although the student is already required to report to the school DSO any changes in their address and their OPT employer's name and address, and the school is then required to report this information to SEVIS, program familiarity and anecdotal evidence indicates that full compliance is lacking. The increased incentives to comply with the reporting requirements provided in this rule will result in about 2.5 additional reports per student per extension period from students to schools and schools to SEVIS. Each report or update will require an estimated 10 minutes. Thus, for the 12,000 students and graduates expected to benefit from this rule, an additional reporting burden of 5,000 hours (12,000 × .42 hours) is estimated to occur for both the student and school for a total of 5,000 additional hours of burden. Based on the private industry employer average

compensation costs of $28.03 per hour worked,[16] this requirement will result in an estimated total cost of $140,150 (5,000 hours × $28.03).

DHS has determined that the currently approved information collection burden for SEVIS contains a high enough estimate of that program's paperwork burden on program participants to encompass this rule's requirements because reporting requirements were already imposed, although not with the utmost clarity. Also, current regulations do not impose any penalty on a school or student for failure to report. SEVP will work with schools on the best way to implement this new reporting requirement so as to maximize its benefit while minimizing its burden on participating students and schools. SEVP is making conforming amendments to its approved information collection for SEVIS and has included the updated burden estimates. Public comments are especially welcome on these changes.

E-Verify Registration. This rule requires employers of F–1 students participating in the 17-month OPT extension to enroll in E-Verify. That will require the employer to register for EVerify if they wish to hire an employee under the extended OPT. Less than 1 percent of the total number of employers in the United States are currently enrolled in E-Verify and a similar percentage of enrollment in EVerify would be expected for OPT employers. Thus, DHS anticipates that most employers who would want to employ these

[16] Employer Costs for Employee Compensation, All civilian occupations, 3rd Quarter 2007, U.S. Department of Labor. Bureau of Labor Statistics at http://data.bls.gov/cgi-bin/surveymost. No consideration is given to possibly lower wage rates applicable for students.

students under the 17-month extension would need to register for E-Verify.[17]

The time and cost associated with registering for E-Verify largely depends on the access method a company chooses. The vast majority of companies will sign up for employer access which requires approximately 3 to 4 hours for a person to register online, read and review the Memorandum of Understanding, and take the tutorial. A recent cost analysis for the E-Verify program looked at the associated costs for an organization to undertake the above tasks based on an average salary and the time required. According to this analysis, a company would spend an average of $170 per registration for the Employer Access method. This cost could increase if an employer chose to use a Designated Agent or Web Services as their access method. The Designated Agent costs can vary greatly and would be difficult to estimate as many employers contract with a Designated Agent to perform a variety of human resources related tasks. Web Services would also likely involve a significant cost and time to the employer as they would need to design their own software to interface with the E-Verify system.

DHS has no record of the numbers or identity of employers hiring students under OPT, no figures on those that hire students and also participate in EVerify, no data on the average number of employees in such firms, and no data on the average number of employees hired by such firms for which the immigration status will have to be verified. However, since this rule is applicable only to STEM students and recent graduates, it is estimated that the employers and po-

[17] No allowance is made for the few employers that would choose to no longer hire students under OPT because of this requirement.

sitions will be similar in characteristics to those hiring employees in the H–1B specialty worker program. In that program, USCIS records show that in FY 2007, about 29,000 different employers employed at least one of the 65,000 initial H–1B employees (based on employer identification number) with about 20,000 employing only one H–1B employee. Thus, employers hiring new H–1B employees in FY 2007 hired an average of 2.24 each. If the 12,000 tudents per year that DHS is estimating will receive an OPT extension are distributed along those same lines, as is expected, they will work for approximately 5,357 employers (12,000/2.24). Since about 1.0 percent of employers are already enrolled in EVerify already, 5,300 employers are estimated to have to enroll in E-Verify as a result of this rule. At $170 per registration for the Employer Access method, the total initial enrollment costs from this rule would be $901,000.[18]

At the end of registration, the company is required to read and sign a Memorandum of Understanding (MOU) that provides the terms of agreement between the employer, SSA, and USCIS. It is expected that each company will have a Human Resources manager review the MOU and that many companies will also have a lawyer and or a general manager review the MOU. Using the Bureau of Labor Statistics (BLS) estimates for the average hourly labor rate, plus a multiplier of 1.4 to account for fringe benefits, DHS calculated a labor rate of $48.33 for an HR manager, $60.93 per hour for a general manager, and $76.09

[18] It is assumed for this analysis that there would be no initial costs for acquiring computers or Internet connections for employers that would hire an OPT student or graduate with an STEM major study area.

for legal counsel.[19] Based on the amount of time that company employees are expected to spend reviewing and approving the MOU, DHS estimates this rule will cost the 5,300 establishments that must enroll in E-Verify in order to hire OPT students about $64 each or a total of $339,200 to review, approve, and sign the MOU.

New hire verification. This rule will require the affected employers of students to verify the status of every new employee they hire using EVerify.[20] To calculate this annual cost, DHS estimated the number of new employees hired by these employers in an average year. While there is no record of the average size of an employer of OPT students, it is assumed that the average monthly and annual employee hire rate for these employers is consistent with the average. An estimate of the average number of employees may be made based on the average number of employees per firm in industries where STEM employment is prevalent. The 2002 Economic Census[21] indicates that, as of 2002, in industries where STEM employment is most prevalent, 1.7 million firms have 26.5 million employees, or an average of 16 employees per firm.[22] According to the Bureau of Labor Statistics, the new

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[19] The 1.4 multiplier used here to adjust base compensation levels to account for private industry compensation costs was taken from the BLS publication "Employer Costs for Employee Compensation—March 2007."

[20] There is no requirement that these employers verify the immigration status of their current employees.

[21] Available on line at http://www.census.gov/econ/census02/guide/SUBSUMM.HTM.

[22] Information: 3,736,061 employees, 137,678 establishments. Professional, Scientific, and Technical Services: 7,243,505 employees, 771,305 establishments. Educational Services: 430,164 employees, 49,319 establishments. Health Care and Social Assistance: 15,052,255 workers, 704,526 establishments.

hires rate (number of hires to the payroll during the month as a percent of total employment) in the industries where STEM employment is believed to be most prevalent was about 2.5 percent in February 2008.[23] Therefore, for 12 months, newly hired and rehired employees amount to about 30 percent (12 months × 2.5 percent monthly hire rate) of the total number of current employees in the STEM related industries. For an establishment with 16 employees, that hire rate would result in about 5 new hires per year.

To verify new hires, the E-Verify participant company must submit a query before the end of three business days after the new hire's actual start date. Based on the number of queries and case resolutions for the current EVerify program from January through June of 2007, the time required to enter this information into the computer and submit the query, and the costs incurred by an employee to challenge occurrences of tentative nonconfirmation, DHS has calculated the combined costs incurred by an employer and prospective employee to verify each new hire to be about $6.36 per new hire. Thus, the annual public cost incurred for verification of new hires for the 5,300 employers affected by this rule is around $168,540 (5,300 × 5 × $6.36).

In summary, the total public cost of this rule requiring employers of F–1 students participating in the 17-month OPT extension to enroll in E-Verify will be $1,240,000 ($901,000 + $339,200) up front and $168,540 per year thereafter.

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[23] Bureau of Labor Statistics. Job Openings and Labor Turnover Survey. Available on line at http://www.bls.gov/web/ceshighlights.pdf.

Government Costs

This rule requires no additional outlays of DHS funds. The requirements of this rule and the associated benefits are funded by fees collected from persons requesting these benefits. The fees are deposited into the Immigration Examinations Fee Account. These fees are used to fund the full cost of processing immigration and naturalization benefit applications and petitions and associated support services.

Public Benefit

Improved U.S. competitive position for STEM students and employees. The primary benefits to be derived from allowing the extension of OPT relates to maintaining and improving the United States competitive position in the market. Over the past 20 years, there has been a sustained globalization of the STEM labor force, according to the National Science Board's "Science and Engineering Indicators 2008." Increased globalization has turned the labor market for STEM workers into a worldwide marketplace.[24] Today, investment crosses borders in search of available talent, talented people cross borders in search of work, and employers recruit internationally. Slowing of the growth of the science and engineering labor force in the United States could affect both technological change and economic growth. As a result, the United States must be successful in the increasing international competition for immigrant and temporary nonimmigrant scientists and engineers. The employment-based immigrant visa ceiling makes it difficult for foreign students to stay in the United States

[24] National Science Foundation, National Science Board, "Science and Engineering Indicators 2008." Available on line at http://www.nsf.gov/statistics/seind08/.

permanently after their studies because long delays in the immigrant visa process usually makes it impractical to be directly hired with an immigrant visa. Though obtaining a nonimmigrant work visa like an H–1B is a much quicker process, the oversubscription of the H–1B program makes obtaining even temporary work authorization an uncertain prospect. Studies show that the most talented employees worldwide are increasingly unwilling to tolerate the long waits and uncertainty entailed in coming to work temporarily in or immigrating to the United States. Instead, they are going to Europe, Canada, Australia and other countries where knowledge workers face fewer immigration difficulties.[25]

This rule will help ease this difficulty by adding an estimated 12,000 OPT students to the STEM-related workforce. With only 65,000 H–1B visas available annually, this number represents a significant expansion of the available pool of skilled workers.

Student's quality of life. The most significant qualitative improvement made by this rule is the enhancement related to improving the quality of life for participating students by making available an extension of OPT status for up to 17 months for certain students following post-completion OPT. Additionally, the changes to the cap gap provision for F–1 students will allow up to 10,000 students to remain in the United States and work while waiting to become an H–1B worker. These and similar changes made by this rule will significantly enhance the experience of the student who participates in the program by potentially

[25] E.g. Hansen, Fay, "Green Card Recruiting," Workforce Management, Recruiting and Staffing (Jan. 2007). Available on line at http://www.workforce.com/section/06/feature/24/64/42/index.html.

allowing them more time and flexibility while considering employment in the United States. Students should experience much less stress about their need to comply with tight time frames or risk being out of status. These changes will result an increase in the attractiveness of the program.

Conclusion

This rule will cost students approximately $1.49 million per year in additional information collection burdens, $4,080,000 in fees, and cost employers $1,240,000 to enroll in EVerify and $168,540 per year thereafter to verify the status of new hires. However, this rule will increase the availability of qualified workers in science, technology, engineering, and mathematical fields; reduce delays that place U.S. employers at a disadvantage when recruiting foreign job candidates; increase the quality of life for participating students, and increase the integrity of the student visa program. Thus, DHS has determined that the benefits of this rule to the public exceed its costs.

E. Executive Order 13132

This rule will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all departments are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. To implement the changes discussed in this rulemaking, USCIS is making conforming amendments to Form I–765, Application for Employment Authorization (current OMB Control No. 1615–0040), which is used by students to apply for pre- and post-completion OPT. Specifically, this form is being amended to add a new question #17, asking STEM students to provide their degree, the name of their employer (as listed in E-Verify), and their employer's E-Verify Company identification number or, if the employer is using a Designated Agent to perform the E-Verify queries, a valid EVerify Client Company identification number. The collection of this information is necessary to ensure that F–1 students seeking a 17-month extension of their post-completion OPT are, in fact, eligible to do so. E-Verify has been approved by OMB under OMB Control No. 1615–0092. USCIS will submit an OMB Correction Worksheet (OMB 83–C), increasing the number of respondents, for both Form I–765 and EVerify (OMB Control No. 1615 -0092).

To implement the changes discussed in this rulemaking, SEVP is making conforming amendments to its information collection for the Student and Exchange Visitor Information System (SEVIS; current OMB Control No. 1653–0038). This authorization encompasses all data collected to meet the requirements of the Student and Exchange Visitor Program (SEVP). This further includes completion of Forms I– 20, Certificate of Eligibility for Nonimmigrant Student Status, which are updated and generated by SEVIS in

the recommendation for employment authorization and tracking of activity. The reporting requirements in this rule will impact 3% of the total number of F–1 students, those who are eligible for the 29-month OPT option. Additions to the reporting burden include:

• DSO verification of student qualification for OPT and issuance of a Form I–20 recommending the 17-month extension of OPT for STEM students (five minutes per student applicant);

• Semiannual verification of student and employment information in SEVIS for all students with an approved 17- month extension of OPT (five minutes for both the student and a DSO per verification); and

• Updates to SEVIS records of about 25% of the students with an approved 17-month OPT who report a change in student name, student address, employer name, or employer address (five minutes for both the students and a DSO per verification).

• Updates by the DSO to SEVIS based on an estimated 600 reports by an employer that the student's employment has ended (five minutes for the reporting DSO).

The aggregate annual increased burden related to all students on extended OPT is 12.5 minutes per student and 20 minutes per supporting DSO. Accordingly, SEVP has submitted the amended Supporting Statement, along with an OMB Correction Worksheet (OMB 83–C), increasing the number of respondents, the annual reporting burden hours and annual reporting burden cost for submitting.

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 8 CFR part 214 is amended as follows:

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305 and 1372; section 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 8 CFR part 2.

2. Amend § 214.2(f) by:

a. Revising paragraph (f)(5)(vi); and b. Revising paragraphs (f)(10)(ii)(A), (C), and (E); and by;

c. Revising paragraphs (f)(11) and (f)(12).

The revisions read as follows: § 214.2 Special requirements for admission, extension and maintenance of status.

* * * * *

(f) * * *

(5) * * *

* * * * *

(vi) Extension of duration of status and grant of employment authorization. (A) The duration of status, and any employment authorization granted under 8 CFR 274a.12(c)(3)(i)(B) and (C), of an F–1 student who is the beneficiary of an H–1B petition and request

for change of status shall be automatically extended until October 1 of the fiscal year for which such H–1B visa is being requested where such petition:

(1) Has been timely filed; and (2) States that the employment start date for the F–1 student is October 1 of the following fiscal year.

(B) The automatic extension of an F–1 student's duration of status and employment authorization under paragraph (f)(5)(vi)(A) of this section shall immediately terminate upon the rejection, denial, or revocation of the H–1B petition filed on such F–1 student's behalf.

(C) In order to obtain the automatic extension of stay and employment authorization under paragraph

(f)(5)(vi)(A) of this section, the F–1 student, according to 8 CFR part 248, must not have violated the terms or conditions of his or her nonimmigrant status.

(D) An automatic extension of an F–1 student's duration of status under paragraph (f)(5)(vi)(A) of this section also applies to the duration of status of any F–2 dependent aliens.

* * * * *

(10) * * *

(ii) Optional practical training.

(A) General. Consistent with the application and approval process in paragraph (f)(11) of this section, a student may apply to USCIS for authorization for temporary employment for optional practical training directly related to the student's major area of study. The student may not begin optional practical training until the date indicated on his or her employment authorization document, Form I–766. A student may be granted authorization to engage in temporary employment for optional practical training:

(1) During the student's annual vacation and at other times when school is not in session, if the student is currently enrolled, and is eligible for registration and intends to register for the next term or session;

(2) While school is in session, provided that practical training does not exceed 20 hours a week while school is in session; or

(3) After completion of the course of study, or, for a student in a bachelor's, master's, or doctoral degree program, after completion of all course requirements for the degree (excluding thesis or equivalent). Continued enrollment, for the school's administrative purposes, after all requirements for the degree have been met does not preclude eligibility for optional practical training. A student must complete all practical training within a 14-month period following the completion of study, except that a 17- month extension pursuant to paragraph (f)(10)(ii)(C) of this section does not need to be completed within such 14-month period.

* * * * *

(C) 17-month extension of postcompletion OPT for students with a science, technology, engineering, or mathematics (STEM) degree. Consistent with paragraph (f)(11)(i)(C) of this section, a qualified student may apply for an extension of OPT while in a valid period of post-completion OPT. The extension will be for an additional 17 months, for a maximum of 29 months of OPT, if all of the following requirements are met.

(1) The student has not previously received a 17-month OPT extension after earning a STEM degree.

(2) The degree that was the basis for the student's current period of OPT is a bachelor's, master's, or doctoral degree in one of the degree programs on the current STEM Designated Degree Program List, published on the SEVP Web site at http://www.ice.gov/sevis.

(3) The student's employer is registered in the E-Verify program, as evidenced by either a valid E-Verify company identification number or, if the employer is using a designated agent to perform the E-Verify queries, a valid E-Verify client company identification number, and the employer is a participant in good standing in the EVerify program, as determined by USCIS.

(4) The employer agrees to report the termination or departure of an OPT employee to the DSO at the student's school or through any other means or process identified by DHS if the termination or departure is prior to end of the authorized period of OPT. Such reporting must be made within 48 hours of the event. An employer shall consider a worker to have departed when the employer knows the student has left the employment or if the student has not reported for work for a period of 5 consecutive business days without the consent of the employer, whichever occurs earlier.

(D) Duration of status while on postcompletion OPT. For a student with approved post-completion OPT, the duration of status is defined as the period beginning when the student's application for OPT was properly filed and pending approval, including the authorized period of post-completion OPT, and ending 60 days after the OPT employment authorization expires (allowing the student to prepare for departure, change educational levels at the same school, or transfer in accordance with paragraph (f)(8) of this section).

(E) Periods of unemployment during post-completion OPT. During postcompletion OPT, F–1 status is dependent upon employment. Students may not accrue an aggregate of more than 90 days of unemployment during any post-completion OPT carried out under the initial post-completion OPT authorization.

Students granted a 17-month OPT extension may not accrue an aggregate of more than 120 days of unemployment during the total OPT period comprising any post-completion OPT carried out under the initial postcompletion OPT authorization and the subsequent 17-month extension period.

(11) OPT application and approval process.

(i) Student responsibilities. A student must initiate the OPT application process by requesting a recommendation for OPT from his or her DSO. Upon making the recommendation, the DSO will provide the student a signed Form I–20 indicating that recommendation.

(A) Application for employment authorization. The student must properly file a Form I–765, Application for Employment Authorization, with USCIS, accompanied by the required fee for the Form I–765, and the supporting documents, as described in the form's instructions.

(B) Filing deadlines for precompletion OPT and post-completion OPT.

(1) Students may file a Form I–765 for pre-completion OPT up to 90 days before being enrolled for one full academic year, provided that the period of employment will not start prior to the completion of the full academic year.

(2) For post-completion OPT, the student must properly file his or her Form I–765 up to 90 days prior to his or her program end-date and no later than 60 days after his or her program end-date. The student must also file the Form I–765 with USCIS within 30 days of the date the DSO enters the recommendation for OPT into his or her SEVIS record.

(C) Applications for 17-month OPT extension. A student meeting the eligibility requirement in paragraph

(f)(10)(ii)(C) of this section may file for a 17-month extension of employment authorization by filing Form I–765, Application for Employment Authorization, with the appropriate fee, prior to the expiration date of the student's current OPT employment authorization. If a student timely and properly files an application for a 17-month OPT extension, but the Form I–766, Employment Authorization Document, currently in the student's possession, expires prior to the decision on the student's application for 17-month OPT extension, the student's Form I–766 is extended automatically pursuant to the terms and conditions specified in 8 CFR 274a.12(b)(6)(iv).

(D) Start of employment. A student may not begin employment prior to the approved starting date on his or her employment authorization except as noted in paragraph (f)(11)(i)(C) of this section. A student may not request a start date that is more than 60 days after the student's program end date. Employment authorization will begin on the date requested or the date the employment authorization is adjudicated, whichever is later.

(ii) DSO responsibilities. A student needs a recommendation from his or her DSO in order to apply for OPT. When a DSO recommends a student for OPT, the school assumes the added responsibility for maintaining the SEVIS record of that student for the entire period of authorized OPT, consistent with paragraph (f)(12) of this section. (A) Prior to making a recommendation, the DSO must ensure that the student is eligible for the given type and period of OPT and that the student is aware of his or her responsibilities for maintaining status while on OPT. Prior to recommending a 17-month OPT extension, the DSO must certify that the student's degree, as shown in SEVIS, is a bachelor's, master's, or doctorate degree with a

degree code that is on the current STEM Designated Degree Program List. (B) The DSO must update the student's SEVIS record with the DSO's recommendation for OPT before the student can apply to USCIS for employment authorization. The DSO will indicate in SEVIS whether the employment is to be full-time or parttime, and note in SEVIS the start and end date of employment.

(C) The DSO must provide the student with a signed, dated Form I–20 indicating that OPT has been recommended.

(iii) Decision on application for OPT employment authorization. USCIS will adjudicate the Form I–765 and, if approved, issue an EAD on the basis of the DSO's recommendation and other eligibility considerations.

(A) The employment authorization period for post-completion OPT begins on the date requested or the date the employment authorization application is approved, whichever is later, and ends at the conclusion of the remaining time period of post-completion OPT eligibility. The employment authorization period for the 17-month OPT extension begins on the day after the expiration of the initial postcompletion OPT employment authorization and ends 17 months thereafter, regardless of the date the actual extension is approved.

(B) USCIS will notify the applicant of the decision and, if the application is denied, of the reason or reasons for the denial.

(C) The applicant may not appeal the decision.

(12) Reporting while on optional practical training.

(i) General. An F–1 student who is authorized by USCIS to engage in optional practical training (OPT) employment is required to report any change of name or address, or interruption of such employment to the

DSO for the duration of the optional practical training. A DSO who recommends a student for OPT is responsible for updating the student's record to reflect these reported changes for the duration of the time that training is authorized.

(ii) Additional reporting obligations for students with an approved 17-month OPT. Students with an approved 17-month OPT extension have additional reporting obligations. Compliance with these reporting requirements is required to maintain F–1 status. The reporting obligations are:

(A) Within 10 days of the change, the student must report to the student's DSO a change of legal name, residential or mailing address, employer name, employer address, and/or loss of employment.

(B) The student must make a validation report to the DSO every six months starting from the date the extension begins and ending when the student's F–1 status ends, the student changes educational levels at the same school, or the student transfers to another school or program, or the 17-month OPT extension ends, whichever is first. The validation is a confirmation that the student's information in SEVIS for the items in listed in paragraph (f)(12)(ii)(A) of this section is current and accurate. This report is due to the student's DSO within 10 business days of each reporting date.

3. Amend § 214.3 to add paragraph (g)(3)(ii)(F) as follows:

§ 214.3 Approval of schools for enrollment of F and M nonimmigrants.

* * * * *

(g) * * *

(3) * * *

(ii) * * *

(F) For F–1 students authorized by USCIS to engage in a 17-month extension of OPT,

(1) Any change that the student

reports to the school concerning legal name, residential or mailing address, employer name, or employer address; and

(2) The end date of the student's employment reported by a former employer in accordance with § 214.2(f)(10)(ii)(C)(4).

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

4. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 104–134, 110 Stat. 1321.

5. Amend § 274a.12 by:

a. Adding paragraph (b)(6)(iv) and (v); and

b. Revising paragraph (c)(3).

The revisions read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

(b) * * *

(6) * * *

(iv) A Form I–766, "Employment Authorization Document," under 8 CFR 274a.12(c)(3)(i)(C) based on a 17-month STEM Optional Practical Training extension, and whose timely filed Form I–765, "Application for Employment Authorization," is pending and Form I–766 issued under 8 CFR 274a.12(c)(3)(i)(B) has expired. Employment is authorized beginning on the expiration date of Form I–766 issued under 8 CFR 274a.12(c)(3)(i)(B) and ending on the date of USCIS' written decision on Form I–765, but not to exceed 180 days; or

(v) Or pursuant to 8 CFR 214.2(h) is seeking H–1B nonimmigrant status and whose duration of status and employment authorization have been extended pursuant to 8 CFR 214.2(f)(5)(vi).

* * * * *

(c) * * *

(3) A nonimmigrant (F–1) student who:

(i)(A) Is seeking pre-completion practical training pursuant to 8 CFR 214.2(f)(10)(ii)(A)(1)–(2);

(B) Is seeking authorization to engage in post-completion Optional Practical Training (OPT) pursuant to 8 CFR 214.2(f)(10)(ii)(A)(3); or

(C) Is seeking a 17-month STEM OPT extension pursuant to 8 CFR 214.2(f)(10)(ii)(C);

* * * * *

Dated: April 2, 2008.

Michael Chertoff,

Secretary.

[FR Doc. E8–7427 Filed 4–7–08; 8:45 am]

BILLING CODE 4410–10–P

Appendix G—First Amended Complaint (Aug. 20, 2008)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

The Programmers Guild, Inc., American Engineering Association, Inc., Bright Future Jobs, Michael Amanti, Mark Blackburn, Toni L. Chester, David Huber, John G. Marson, P. Harrison Picot II, Paul E. Polak, Mike Rothschild, Robert Sanchez, Stephen Berry, Stephanie Berry

Plaintiffs,

v.

Michael Chertoff in his capacity as Secretary of Homeland Security, United States Department of Homeland Security

Defendants.

Civil Action No. 2:08-cv-2666

First Amended Complaint for Declaratory, Injunctive and Mandamus Relief

1. Three organizational Plaintiffs, twelve of their individual members, and two students bring this case challenging the United States Department of Homeland Security's ("DHS") unlawful rule, extending the Optional Practical Training period for F-1 visa students ("OPT"). Extending Period of Optional Practical Training by 17-Months for F-1 Nonimmigrant Students with STEM (Science, Technology, Mathematics, and Engineering) Degrees and Expanding CapGap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944-18,956 (proposed April 8, 2008)(codified at 8 C.F.R. §§ 214, 274a). Plaintiffs seek declaratory, injunctive and mandamus relief.

2. The three Professional Organization Plaintiffs represent members in occupational fields targeted by the Rule and seek to protect interests germane to each organization's purpose. Their members are directly, adversely affected by the Rule. The Rule increases the number of workers in the members' fields who are in direct competition with their members. As a result of the increased competition caused by this Rule, the members have suffered increased competition when searching for jobs, and will experience depressed wages and direct displacement from jobs by the additional guest workers authorized to work under this Rule. As a result of this Rule, members of these organizations are already suffering lost job opportunities and employment discrimination in jobs that they are qualified to perform by companies who are specifically recruiting only OPT workers. These advertisements for jobs were posted after the Rule's promulgation on April 8, 2008. Twelve of the individual Plaintiffs are members of these organizations and are currently suffering these same injuries. Two individual Plaintiffs are students studying in STEM fields targeted by the rule who now must compete with the additional workers for internships and employment upon graduation as a result of this unlawful rule.

I. PARTIES

3. Plaintiff, The Programmers Guild, Inc., is a professional non-profit organization founded in 1998 to represent the professional interests of computer programmers. Membership in the Programmers Guild is restricted to computer programmers, software engineers and related occupations, all "STEM" fields targeted by the Rule.

The Programmers Guild seeks to protect the competitive interests of its members in the job market. The Rule creates additional economic competition for the Programmers Guild's members by adding foreign workers into the fields in which they work. As a result of the additional competition authorized by this Rule, the Guild members have experienced loss of business opportunities and employment discrimination by employers who are seeking only OPT workers in types of jobs that Guild members are qualified and willing to accept. The Guild members will also experience wage depression and job displacement as a result of the additional authorized workers competing with them in their specific fields under this Rule. The Programmer's Guild is incorporated under the laws of New Jersey. Its service address is The Programmers Guild, Inc., Registered Agent John Miano, E101 103 Park Ave, Summit NJ 07901.

4. Plaintiff, The American Engineering Association ("AEA"), is a professional organization for engineers founded in 1985, organized under the laws of Texas. The American Engineering Association is interested in protecting the economic interests of its members. Its membership consists of engineers; "STEM" fields targeted by this rule. The Rule increases the number of foreign workers in the fields in which AEA members work, increasing economic competition for their members. This competition impairs its members' job opportunities and will have an adverse effect on their wages. Members of the AEA are already experiencing lost job opportunities and employment discrimination as a result of this rule. by companies who specifically advertise to only OPT workers

after the Rule was promulgated on April 8, 2008. The AEA members are fully qualified and able to perform these jobs. The AEA address is American Engineering Association, c/o Harold Ruchelman, 533 Waterside Blvd., Monroe Twp. NJ 08831.

5. Plaintiff, Bright Future Jobs ("BFJ") is a not for profit corporation founded in 2006, organized under the laws of Illinois. Plaintiff Bright Future Jobs educates employers on the importance of seeking local talent for United States job openings before recruiting abroad, through a grassroots campaign dedicated to counteracting claims that Americans cannot "do" science and technology. Members of BFJ work in a variety of "STEM" fields including the medical and computer fields. This Rule increases the number of foreign workers in the fields in which BFJ members work and actively seek employment. As such, the Rule increases economic competition for its members. This increased competition created by the Rule limits job opportunities for BFJ members and depresses their wages. Plaintiff Bright Future Jobs' place of service is at 1553 West Juneway Terrace, Chicago, IL 60626.

6. Plaintiff Michael Amanti is an unemployed computer programmer residing in Illinois. Plaintiff Amanti is currently seeking positions in the "STEM" field of computer programming, either as a full time employee or as a contractor through his sole proprietorship. This Rule creates additional economic competition for Plaintiff Amanti by increasing the number of foreign workers he must compete with when searching for jobs in his field. The increased competition lowers the wages of the jobs he is seeking and limits job opportuni-

ties. Also, Plaintiff Amanti has already seen his job opportunities limited by advertisements for jobs open only to OPT workers. These advertisements were posted after Defendants promulgated this Rule on April 8, 2008. Mr. Amanti is qualified and willing to accept these types of jobs. Plaintiff Amanti's address is 283 Doral Court, Elk Grove Village IL 60007-2794. Plaintiff Amanti is a member of the Programmers Guild.

7. Plaintiff Mark Blackburn is a member of the Programmers Guild and a computer programmer. Plaintiff Blackburn is a temporary contract worker, which means he works on a specific job for a temporary period of time, and then must search for a new job when that one ends. Mr. Blackburn wants to work near his home; however, he has been forced to work out-of-state at a much lower pay rate due to the increased number of foreign workers in his field. This Rule will further increase the number of foreign workers directly in competition for jobs in Mr. Blackburn's field. This increased competition will lower wages and compensation and reduce the number of contract employment opportunities available for him. His address is 1310 E Street, Sacramento, CA 95814.

8. Plaintiff Toni L. Chester is an underemployed computer programmer and member of the American Engineering Association and the Programmers Guild. Plaintiff Chester provides her temporary contract computer programming services through her S-Corporation. She is actively seeking new work as her current temporary assignment will end within the next few months. This Rule puts Ms. Chester in direct competition with the additional foreign workers authorized to

work in her field. The increased competition from the additional workers will reduce her wages and job opportunities. Plaintiff Chester has already seen her job opportunities limited by advertisements for jobs open only to OPT workers. These advertisements were posted after Defendants promulgated this Rule on April 8, 2008. Ms. Chester is qualified and willing to accept these types of jobs. Plaintiff Chester is a resident of New Jersey.

9. Plaintiff David Huber is a member of the Programmers Guild and is an underemployed computer professional. Mr. Huber is a temporary contract worker who is actively seeking employment in network engineering, which is a STEM field targeted by the DHS Rule. Mr. Huber's wages have declined substantially due to foreign guest workers competing with him for jobs. This Rule places Plaintiff Huber in direct competition for jobs with additional foreign workers who would lack work authorization, but for promulgation of this Rule by Defendants. The increased competition created only as a result of this Rule will further limit job opportunities and further decrease his wages. His address is P.O. Box 10198, Chicago, IL 60610.

10. Plaintiff John G. Marson is an unemployed engineer. Mr. Marson is currently seeking jobs in the STEM fields targeted by this Rule. This Rule harms Plaintiff Marson's economic interests by putting him in direct competition for jobs with additional workers. These additional workers would not be competing with Mr. Marson because they would lack work authorization without this Rule. The additional competition from this Rule limits job opportunities for Mr. Marson and adversely

affects his compensation and wages. Plaintiff's address is 2202A Glenwood Drive, Tampa, FL 33602.

11. Plaintiff P. Harrison Picot II is an unemployed computer programmer who faces increased job competition from additional foreign workers authorized to work only as a result of this Rule. Plaintiff Picot is currently seeking employment as a computer programmer, a field specifically targeted by the DHS Rule. Plaintiff Picot has already seen his job opportunities limited by advertisements for jobs open only to OPT workers. These advertisements were posted after Defendants promulgated this Rule on April 8, 2008. Plaintiff Picot is qualified for and would work in these types of positions. His address is 2407 Raymond Place, Haymarket, VA 20169-1541.

12. Plaintiff Paul E. Polak is an unemployed scientist residing in Indiana. The Rule will increase the number of workers directly competing with Plaintiff Polak in the STEM field of science. This increased competition limits job opportunities available to him and depresses the wages in the jobs he seeks. Plaintiff Polak's address is 8108 Forest Ave., Munster IN 46321. Plaintiff Polak is a member of the Programmers Guild.

13. Plaintiff Mike Rothschild is a computer programmer who provides temporary contract computer programming services through his S-Corporation. The Rule creates additional economic competition for Mr. Rothschild as it adds additional foreign workers in the same STEM field of computer programming in which he seeks employment. Plaintiff Rothschild is currently seeking

employment as a computer programmer, a field specifically targeted by the DHS Rule. Plaintiff Rothschild has already seen his job opportunities limited by advertisements for jobs open only to OPT workers. These advertisements were posted after Defendants promulgated this Rule on April 8, 2008. Plaintiff Rothschild is qualified for and would work in these types of positions. Plaintiff Rothschild is a member of Bright Future Jobs. Plaintiff Rothschild's address is 7441 N. Hoyne Ave. Chicago, IL 60645.

14. Plaintiff Robert Sanchez is a member of the Programmers Guild and an underemployed computer programmer. Mr. Sanchez's wages have substantially declined as a result of the number of foreign workers in his field. The Rule will increase the number of guest workers in direct competition for STEM computer programming jobs with Mr. Sanchez, further restricting the job opportunities available to him. The increased number of workers in his STEM field resulting from the Rule will cause wage depression in his profession. Additionally, the taxation rules and lack of labor certification for OPT places Mr. Sanchez in a competitive disadvantage to OPT workers for hiring. Plaintiff's address is 3642 W. Barcelona Dr., Chandler AZ. 85226.

15. Plaintiff Stephen Berry is a sophomore at California Polytechnic State University, San Luis Obispo, majoring in Computer Engineering, a STEM field targeted by the Rule. By adding foreign workers into the STEM field in which he is studying, the Rule increases the competition Stephen Berry has for internships and eventually jobs in his field. Mr. Berry will suffer these harms

immediately when he applies for internships and will also suffer these harms as he applies for job positions after graduation. Mr. Berry's address is 1 Grand Ave. San Luis Obispo CA 93401.

16. Plaintiff Stephanie Berry is a senior at the University of Southern California in architectural/structural engineering, a STEM, field targeted by the Rule. Ms. Berry is applying for full time positions in the architectural and structural engineering profession following graduation this Spring. The increased number of foreign workers authorized to work in her field as a result of this Rule increases the competition Ms. Berry faces when applying for jobs post graduation. The Rule is will reduce job opportunities for Ms. Berry and depress her starting wages. Ms. Berry will suffer these harms immediately as she applies for jobs. Ms. Berry's address is 920 W. 37th. Place #2302 Los Angeles CA 90007.

17. Defendants' address for service is Office of the General Counsel, United States Department of Homeland Security, Washington, D.C. 20258. 6 C.F.R. § 5.42.

II. GENERAL ALLEGATIONS

18. On or about April 8, 2008 the Defendants caused to be published in the Federal Register a rule (the "Rule") amending 8 CFR §§ 214, 274a to allow aliens admitted on F-1 student visas who have received degrees mathematics, engineering, science, or technology to work in the United States for up to 29 months. 73 Fed. Reg. 18944–18956.

19. The claimed authorization for the Rule is 8 U.S.C. § 1101(a)(15)(F)(i). That federal statute creates the F-1 student visa classification.

20. Per 8 U.S.C. § 1101(a)(15)(F)(i), issuance of F-1 student visas is authorized for temporary admission "solely for the purpose of pursuing [] a course of study."

21. Prior to the promulgation of this rule, foreign students admitted on F-1 visas were allowed to work for up to 12 months on Optional Practical Training (OPT) in furtherance of their educational goals.

22. The new rule allows foreign "students" on F-1 visas with degrees in STEM fields to work up to 29-months for the purpose of solving a "critical shortage" of workers in fields identified by the Defendants. 73 Fed. Reg. 18944–18956.

23. Defendants stated, "[T]his rule will increase the availability of qualified workers in science, technology, engineering, and mathematical fields." 73 Fed. Reg. 18,951.

24. This increased supply of workers in the fields in which the Plaintiffs work causes injury through increased competition to the Plaintiffs.

25. The Rule promulgated by Defendants is in direct conflict with the statutory authorization for F-1 visas, which is that they are temporarily admitted "solely to" pursue "a course of study."

26. In announcing the Rule, Defendants provide no explanation how this Rule furthers the purpose of "pursuing [] a course of study". 73 Fed. Reg. 18944–18956.

27. Defendants implemented the Rule without public notice or comment as required by the Administrative Procedures Act ("APA"), 5 U.S.C. § 553(b).

28. Defendants also provided no justification why the Rule needed to be implemented under waiver of notice and comment. 73 Fed. Reg. 18944–18956.

29. The Rule is now in effect. This case is now ripe for adjudication.

30. The Plaintiffs now bring this action to challenge the implementation of the Rule as authorized under the provisions Administrative Procedures Act, 5 U.S.C. §§ 701–706.

III. JURISDICTION AND VENUE

31. The Plaintiffs have the right to bring this action under the Administrative Procedures Act, 5 U.S.C. §§ 701–706.

32. This Court has jurisdiction over this action pursuant to the Administrative Procedure Act, 5 U.S.C. § 706 (2).

33. This Court has jurisdiction over this action because it is a federal question under 28 U.S.C. § 1331.

34. This Court has jurisdiction over this action because the defendant is the United States, 28 U.S.C. § 1346.

35. Mandamus relief is authorized under 28 U.S.C. § 1361.

36. Declaratory judgment relief is authorized under 28 U.S.C. § 2201.

37. Injunctive relief is authorized under 28 U.S.C. § 2202.

38. Cost and fees are authorized 28 U.S.C. § 2412.

39. Venue is properly vested in this Court as Plaintiffs reside in New Jersey.

IV. FIRST CAUSE OF ACTION

40. Plaintiffs incorporate by reference ¶¶ 1-39 above.

41. The changes to 8 CFR §§ 214 and 274a under 73 Fed. Reg. 18944–18956 are not authorized by law. 8 U.S.C. § 1101(a)(15)(F)(i) authorizes admission for those entering the United States, "temporarily and solely for the purpose of pursuing [] a course of study." The statute does not authorize a 29-month guest worker program for mathematics, engineering, sciences and technology.

42. 8 U.S.C. 1101(a)(15)(F)(i) does not authorize Defendants to identify fields in which there may be labor shortages.

43. 8 U.S.C. 1101(a)(15)(F)(i) does not authorize Defendants to allow those admitted on F-1 visas to work in the United States for extended periods of time to solve labor shortages.

44. As such, the implementation of final rules 8 CFR §§ 214 and 274a under 73 Fed. Reg. 18944–18956 exceeded the statutory jurisdiction and authority of the Secretary of Homeland Security, and limitations thereon, in violation of 5 U.S.C. §§706(2)(C).

V. SECOND CAUSE OF ACTION

45. Plaintiffs incorporate by reference ¶¶ 1–44 above.

46. The provisions of final rules 8 CFR §§ 214 and 274a under 73 Fed. Reg. 18944-18956 are not in accordance of the law.

47. The implementation of the final rules by the Defendant was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of 5 U.S.C. § 706(2)(A).

VI. THIRD CAUSE OF ACTION

48. Plaintiffs incorporate by reference ¶¶ 1–48 above.

49. Defendants waived the notice and comment requirements of the APA to implement the changes to rules 8 CFR §§ 214, 274a under 73 Fed. Reg. 18944–18956 without just cause under 5 U.S.C. § 553(b).

50. There were no circumstances that justified that waiver.

51. The Defendant implemented the changes to rules 8 CFR §§ 214, 274a under 73 Fed. Reg. 18944–18956 without observance of procedure required by law, in violation of 5 U.S.C. § 706(2)(D).

VII. PRAYER FOR DECLARATORY RELIEF

52. Plaintiffs incorporate by reference ¶¶ 1–51 above.

53. An actual controversy exists between Plaintiffs and Defendants regarding the legality and enforceability by the Defendants amendments to 8 CFR Parts 214 and 274a as amended by 73 Fed. Reg. 18944–18956.

54. Plaintiffs are entitled to a declaration on the legality of the challenged amendments, that:

(1) Defendant's changes to 8 C.F.R. 215, as amended by 73 Fed. Reg. 18944–18956, were unlawful.

(2) Defendant's waiver of notice and comment to implement changes to 8 C.F.R. 215, as amended by 73 Fed. Reg. 18944-18956, was unlawful.

VIII. PRAYER FOR INJUNCTIVE RELIEF

55. Plaintiffs incorporate by reference ¶¶ 1–54 above.

56. Plaintiffs' claims meet the standard for injunctive relief because (1) they have no adequate remedy at law; (2) they will suffer immediate, continuing and irreparable harm from reduced job opportunities, wage depression, and discrimination if aliens are permitted to work under student visas for 29 months. (3) Plaintiffs are likely to succeed on the merits of their claims; and (4) Defendants will suffer no harm in being denied the opportunity to implement amendments to 8 CFR Parts 214 and 274a in the circumstances alleged in this case pending resolution of the merits of the case. Issuance of the injunction will retain the status quo.

~ * * * ~

WHEREAS, because of the actions alleged above, Plaintiffs respectfully ask this Court to enter and order in favor of the Plaintiffs to grant the following relief:

A. That a preliminary and a permanent injunction be issued enjoining the Defendants in perpetuity from implementing or enforcing 8 CFR Parts 214 and 274a as amended as under 73 Fed. Reg. 18944–18956;

B. That the implementation of 8 CFR Parts 214 and 274a, as amended as under 73 Fed. Reg. 18944-18956 without public notice, be declared to be in violation of federal law;

C. That Plaintiffs recover from Defendants all of Plaintiffs' reasonable attorney's fees, expenses, and costs under 28 U.S.C. § 2412, as this Court deems just and proper;

D. The Court retain jurisdiction of this action to ensure compliance with the Court's decree; and

E. That Plaintiffs be granted any further relief as the Court deems just and proper.

Dated this 20th day of August, 2008

John M. Miano
Admitted to this Court
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Summit NJ 07901

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Appendix H—Chertoff Remarks

Homeland Security

Remarks by Homeland Security Secretary Michael Chertoff and Department of Commerce Secretary Gutierrez at the State of Immigration Address

Release Date: June 9, 2008
For Immediate Release
Office of the Press Secretary
Contact: 202-282-8010
Washington, D.C.

Secretary Chertoff:

Good afternoon everybody. I am joined here by Secretry Gutierrez, the Secretary of Commerce, who I am delighted to have with me. As you probably remember, last August we promised to provide regular updates to the American people on our efforts to secure the border, enforce immigration laws and meet the needs of our economy by reforming temporary worker programs to the extent the current laws permit us to do so.

This will be the third update since the administration announced our 26 immigration reform and transformation initiatives in the wake of the failure of comprehen-sive immigration reform to pass Congress last year. Today we are going to highlight three major areas: first our continued progress at the border, second our continued efforts to provide employers with better tools to maintain a legal workforce and third, our efforts to strengthen and make more efficient our foreign temporary worker programs.

In each area you will see clear evidence of our progress, and of our commitment to address the nation's immigration challenges using the tools, resources and authorities at our disposal. But again we will remind you that the need to address this program more comprehensively by Congress remains. And we hope Congress will in the very near future turn to this issue once again.

[...][Discussion of border security initiatives and EVerify omitted]

Let me give you just a brief survey of some of the things we have done recently. In April we published an interim final rule that extends the total period of optional practical training from 12 to 29 months for—immigrant students with a degree in science, technology, engineering or mathematics, who have accepted employment with an employer enrolled in E-Verify.

What this does is it allows us to continue to keep smart, well-educated foreign students who want to come over and ultimately get a work visa, allows us to keep them in place doing productive work while they are awaiting the work visa process. And that's not just good for them. It actually creates jobs in the American economy for others as well. So it's a win-win both for the students, a win-win for the employers and a win-win for American workers.

The H-1B program, which is similarly focused on getting some of the best and the brightest to get these work visas so they can work and produce, and add value to the United States. This program also has to be refined to be made more fair and more orderly. For this reason, in March of this year we published an interim final rule that prohibits the filing of duplicate—

multiple H-1B petitions by a single U.S. employer for the same foreign worker.

Essentially what happened was it was like buying a lot of lottery tickets. Some people tried to hoard the marketplace, or flood the marketplace by filing duplicate —multiple applications to try to get as many of these spots as possible.

That wasn't fair to other employers. It didn't do the job of distributing these visas as widely as possible and as efficiently as possible in the economy, so this new regulation will act to prevent employers from flooding the system with petitions and will allow a broader array of employers to participate in a fair and more equitable fashion in this system.

I'm also pleased to announce that we will be extending the validity period of the employment authorization documents that we issue to individuals who are waiting adjustment of status to lawful permit residenture or in colloquial phrase, the green card.

Currently, adjustment applications are granted employment authorization documents with only a one year maximum validity. Beginning later this month, we'll start issuing these documents with a two-year validity period for aliens who are waiting adjustment of status if their application is expected to be pending for more than a year.

This, again, is eliminating a persistent source of frustration for workers who are here, who have a pending adjustment application but have to go and renew their employment documents every single year. It's going to cut the paperwork there.

Finally, I'd like to talk about the H-2B program, which relates to seasonal and tem-porary non-agri-

cultural workers. As you know, the cap on this went down and we're still awaiting Congressional action to lift the cap up, again, which is going to help not only ease applicants for jobs and not only the employers who want to hire them, but all the other people who benefit when workers produce productive activity and then the benefits ripple through the economy.

Currently, up to 66,000 foreign workers are admitted under this visa category and typical employment for H-2B workers includes landscaping, hotels, crab and clam industries, and resort areas; particularly those things which become more populated during the summer months.

As you know the Labor Department published a proposed rule in May addressing a number of bureaucratic and inefficiency concerns that had been raised about this program. But today we have sent over the Office of Management and Budget here at the Department of Homeland Security a new proposed regulation which would also propose some significant changes designed to increase the effectiveness and attractiveness of this H-2B immigrant classification program.

It eliminates certain regulatory barriers, adds protection for foreign workers, and increases efficiency and coordination. It also proposes to change the definition of temporary employment to recognize that some H2B employment could last up to three years. Under this change, an employer who demonstrates a temporary need lasting no more than three years could keep the same worker in the same job for all three years provided they can demonstrate that there's no American worker availa-ble to do that work, because we do put Americans first.

Again, it's going to answer a complaint that we've heard for a long time from the business community. It implements one of the reformed proposals we tried to get done through comprehensive immigration reform, and it's going to produce benefits not only for the employees themselves, but for everybody else who benefits when we can invigorate businesses, particularly seasonable and temporary businesses that produce benefits throughout the entire economy.

The bottom line is we're doing what we said we were going to do last August. We're doing tougher enforcement; more effective enforcement. We are showing results. We are trying to work with the existing law to make it as easy and non-bureaucratic as possible for temporary workers to be brought in to fill jobs American won't fill.

In the end these are not permanent solutions. A truly permanent solution requires a more comprehensive look at the issue of immigration reform. Only Congress can take that step and although we bought some time, perhaps, this problem is going to persist until Congress grabs the nettle and decides that we're going to put together a comprehensive immigration reform program that everybody can live with.

With that I'd like to ask Secretary Gutierrez up here.

Secretary Gutierrez:

Thank you. I would like to talk a little about the business environment and what is happening in the business community as it refers to immigration and the need for immigration reform. There's a lot of discussion about the burden of immigration but there is not enough conversation about the risk of not having enough immigrants, especially a risk to our economy

and a risk to our competitive position as it relates to the rest of the world.

So as you can see from the Secretary's comments immigration reform remains a top priority for the Bush Administration. In the absence of legislation from Congress we've been proactively tackling this issue head on with as many administrative actions as possible.

The American people want and deserve a thoughtful, broad-based approach to immigration that focuses on the security and the economic prosperity of our country. Last August, Secretary Chertoff and I announced a package of administrative re-forms that sharpened existing tools to protect our citizens and make our immigra-tion system more workable.

We've made strides in securing our border. In fact, we've made great strides in se-curing our borders and enforcing existing immigration laws. But we cannot neglect our economic security; and that's exactly what we're doing by not passing compre-hensive immigration reform.

At a time when we are facing tough economic challenges, our actions must boost our economy, not hamper it. The reality is that we simply do not have enough workers at both ends of the spectrum and I will repeat that. Our reality as a nation is that we do not have enough workers at both ends of the spectrum. That means for low-skilled, field laborers, all the way to high-skilled technology workers.

For example, for the fifth straight year our H-1B cap was filled at or before the start of the fiscal year. This year the cap was reached in one week. That's why, as Secretary Chertoff mentioned, we are proposing administrative reforms to our high-skilled pro-

grams and to the H-2B non-agriculture temporary worker program.

In addition, we have proposed changes to the H-2A agricultural seasonal worker program. The changes will make the H-2A system more efficient and ensure an or-derly and timely flow of legal, foreign workers. They will also protect the rights of all agricultural workers, American and foreign, and make no mistake we need both. We don't have enough domestic workers to meet the food needs of our country.

The New York Times ran an article with the headline "Shortage of Labor to Cut Food Supply: Farmers Handicapped by Lack of Help Reduce Their Crop Acreage." That headline and the article ran in 1920. Coincidently that was amidst one of the worst anti-immigration waves that we have ever seen.

Nearly a century later we face similar challenges, but this time, rather than reduce consumption we'll have to turn to foreign producers or move our farms overseas to feed our families. In fact, that is already happening. A survey by the U.S. Farm Group, Western Growers, indicated American companies now farm more than 45,000 acres of land in Mexico employing 11,000 people.

At a time when we are looking to further secure our food supply to tighten our import safety and to continue to increase and contribute to world supply because of the prices of food, we should not encourage the outsourcing of American agriculture. And what Congress is doing by avoiding to pass comprehensive immigration reform is effectively encouraging the outsourcing of American agriculture.

We know there are employers who have not been able to fill many jobs with Ameri-can workers. We sim-

ply can't ignore the problem and hope that the issue will go away. A comprehensive solution remains the best and the most long term option. Without it, we're getting a piecemeal approach, which is something we talked about when we mentioned the fact that comprehensive reform had failed, we talked about the fact that we were going to get a piecemeal approach to a national issue.

For example, in 2007 states enacted 240 immigration laws. That's up from 84 the year before. Immigration is being debated in every capital in the country. A total of 1,562 immigration bills were introduced last year. This patchwork of laws is unten-able in the long term. So we will continue to look at ways to improve existing pro-grams and address all aspects of immigration. Other major economies around the world have realized the need for immigration policy to help them grow their econo-mies, and we are all competing for growth, and everyone is trying to grow their economies and most major economies have realized that they cannot grow without a comprehensive immigration policy.

Our country has a long history of making immigration work. We have more experience than any other nation and it has been one of our greatest advantages, if you look back through our economic history we would not have accomplished what we have accomplished if it were not for the help and the work of immigrants.

We can make immigration an advantage that will last for a century. The issue is not going to go away. Regardless of who is President and regardless of which party is in power, immigration will remain both a tough challenge but also a tremendous opportunity for our country if we get this right, if we approach it

in a thoughtful way, and if we are decisive about confronting a problem that will not go away.

Thank you, and I will be happy to take your questions. [...][Questions from reporters and answers omitted.]

Appendix I—Job Advertisements Seeking OPT Workers

Exhibit 2 to Petitioners' Motion for Preliminary Injunction.

DICE–The Career Hub for Tech Insiders
Digital Mars, Inc. the new frontier

Title:	Hiring graduates in Computers, Engineering, Business Admin on OPT.
Skills:	Graduates in Computers, Engineering, Business Administration on OPT.
Date:	5-5-2008
Location:	Vienna, VA
Area Code:	703
Tax term:	Full time
Pay rate:	open
Length:	Permanent
Position ID:	251592
Dice ID:	10215990

Job Description:

We are currently hiring graduates in Computer Science, Engineering, and Business Administration on OPT.

Start your high-paying career with training by the best faculty of experienced IT Professionals and shape your career. We provide you the experience of working with fortune clients.

** Digital Mars Inc**** Is an established and growing Software Development and IT services Company with 100+ employees on payrolls.

Services**

Application Development
Application Management

Specialties:

Java, Oracle, Dotnet, SQL Server, Server Administration, Database Administra-tion, Quality Assurance, Business Analyst, ERP technologies (SAP, Oracle Applica-tions), Data Warehousing, Peoplesoft, Siebel** to name a few

Direct Clients:

IBM, CDI, Wipro Technologies, Inova Health Care, Sun Microsystems, CTS, Cognizant**, to name a few. We also have a huge list of top notch prime vendors in sup-port of our highly skilled consultants.

Offices:

Our offices are located in Northern Virginia and India.

We offer High Quality training on these technologies:

*******Microsoft dynamics*******

About Microsoft Dynamics

Microsoft Dynamics AX is an integrated, adaptable business management solution that helps your entire business and allows you to choose from comprehensive functionality, including:

- Manufacturing
- Distribution
- Supply Chain Management
- Project Finance
- Financial Management
- Customer Relationship Management

- Human Resource Management
- Business Analysis
- Enterprise Portal, with Microsoft* Windows* SharePoint* Services Integra-tion
- Reporting Services with Microsoft SQL Server* 2005
- Web services and .NET interoperability with Microsoft Visual Studio* 2005
- Business document exchange and integration framework with Microsoft Biz-Talk Server 2006
- Works like and with familiar Microsoft products
- Easily customizable and high scalable
- Advance technology supports your growing business
- Supports connectivity with customers, vendors, business partners and em-ployees.
- Robust, comprehensive functionality, all-in-one source
- Support operations across countries, sites, languages and currencies.

Data Warehousing Tools:

SAP-BW
SAP-XI
Java
Oracle-programming
.Net
ERP Technologies
QA
Cisco Networking

Training Benefits:

o Industry Standard Lab Infrastructure (24/7).
o Competitive pay & benefits.
o Health Insurance.
o Weekend and weekday training schedules.

o Aggressive sales & marketing.

Feel the Zeal to work with a Go-getter like Digital Mars.

Please sent your resumes to recruiter@digital-mars.com/jobs@digital-mars.com or call us at toll free 1-877-254-2520 for immediate response.

Travel required: none
Telecommute: no

Digital Mars
1934 Old Gallows Road
Ste. 350
Vienna, VA 22182
Web: http://www.digital-mars.com

Exhibit 3 to Petitioners' Motion for Preliminary Injunction

DICE–The Career Hub for Tech Insiders
Royal Cyber

Title:	Java/J2EE Developer (F1 on CPT/OPT Only)
Skills:	WebSphere, Java, SQL, DB2
Date:	5-1-2008
Location:	Chicago, IL
Area Code:	630
Tax term:	FULLTIME
Pay rate:	DOE
Position ID:	60002
Dice ID:	RTL192441

Job description:

RoyalCyber currently have (sic) several full time opportunities working for IBM Websphere/Java developers. The ideal candidate will have at least 2–3 years of Java/J2EE development.

Please, visit us at

www.royalcyber.com to learn more about our company and our clients.

Required Skills:

Minimum 2 years of Java, EJB 2.0, JSP, and J2ee experience.

Basic JAVA knowledge and object oriented programming concepts

Basic SQL and RDBMS concepts

Energetic and motivated

Excellent written and verbal communications

Royal Cyber offers excellent benefits and provide (sic) ongoing professional training and certifications. We do sponsor and transfer H1B for successful candidates.

Royal Cyber Inc. an IBM advanced business partner and Microsoft Gold certified partner, is a customer development work in Java/J2EE, IBM WebSphere, etc. (sic). Our clients include several Fortune 500 companies, B2B commerce sites, web-portals and leading web-product companies.

Travel required: None
Telecommute: no

Royal Cyber
Lombard, IL
Web: http://www.royalcyber.com

Exhibit 4 to Petitioners' Motion for Preliminary Injunction

DICE–The Career Hub for Tech Insiders
Vensiti

Title:	Entry Level Unix Administrator
Skills:	C, C++, Unix, AIX, Linux, Shell scripting, Perl, PHP, Veritas, Redhat
Date:	4-16-2008
Location:	Irving, TX
Area Code:	972
Tax term:	FULLTIME
Pay rate:	DOE
Position ID:	UNIX
Dice ID:	10120255

Job description:

Minimum Requirements:

- Troubleshoot OS, software, network, and other system problems
- Improve and promote system scalability and standardization
- Capacity and performance planning for data processing systems
- Work with IT group for hardware procurement and installation
- Create tools and programs to automate tasks
- Recommend and implement security improvements
- Strong communication skills are a must, written and verbal
- The candidate should be prepared to work as a consultant and relocate any-where in the USA

Optional Requirements

*** Experience in or knowledge of LDAP and common web technologies i.e. WebS-phere Application Server, Apache, Tivoli Access Manager, Tivoli Identity Manager, PHP, or similar is helpful but not required.
** Recent graduates with Masters Degree in Computer Science or related field and OPT/CPT status preferred

Why join VENSITI

** H1-B Visa Sponsorship to F-1, H-1, H-4, H-1 or L-2 Visa holders
** H1 to H1 Visa Transfers ** We offer the best deal
** Dedicated legal time to process your H1/GC Sponsorship
** Aggressive marketing team ** We will get you the JOB
** Technical Certification reimbursement program
** Excellent Referral Bonus Program (Up to $1000 per candidate)
** We offer Fixed Salary or Percentage Based Salary
** Comprehensive Benefits-Medical, 401(k) Retirement Plan, Paid Vacations
** We are Equal Opportunity Employer
Who Are WE

VENSITI, Inc. is leading IT consulting firm, based in Irving, Texas, with offices in New Jersey and India (sic). We are currently looking for FULL-TIME employees to work with us, we hire the best talent in the software industry and we have Direct Client and Preferred Vendor Placements. We have an excellent Client-base, where we have constant need for IT Consultants in all leading technologies (sic).

We are a growing company with a huge team of IT professionals. We are market driven and have inter-

national resource to solve our client and employee needs in the most cost effective way. We have a proven record of having helped over 100 companies from start-ups to Fortune 500 Corporations to achieve unparalleled success over the last decade in every aspect of their staffing needs.

You can visit us on http://www.vensiti.com.

Please respond with your resume in MS Word format and Salary expectations.

Travel required: 100%
Telecommute: no

Vishal Prabhu
Vensiti
1304 W. Walnut Lane
Suite 212
Irving, TX 75038
Phone: (972) 580-7995
Web: http://www.vensiti.com

Exhibit 15 to Petitioners' Motion for Preliminary Injunction

monster.com 5/8/2008

PMR Soft Tech (a subsidiary of Innovated Information Technologies Inc.)

Need OPT's/H1's for Java, .Net, Oracle & SAP Projects

Company:	Innovated Information Technologies Inc.
Status:	Full Time, Temporary/Contract/Project, Employee
Job Category:	IT/Software Development
Relevant Work Experience:	1+ to 2 Years
Education Level:	Master's Degree
Location:	200 Metroplex, Dr Suite 408, NJ 08817
Shift:	Third Shift (Night), Second Shift (Afternoon), First Shift (Day)
Occupations:	Software/Web Development; Systems Analysis-IT; Web/UI/UX Design
Career Level:	Entry Level

Job Description

Innovative Information Technologies, Inc. has been serving Fortune 500 corporations since 1997 Our mission is to deliver high-quality technology solutions that en-able companies to meet their business goals effectively (sic)

We have specific expertise supporting a broad spectrum of leading organizations in the following indus-

tries Pharmaceutical, Financial Services, Insurance, Healthcare energy Telecommunications.

Currently we have immediate requirements for Software engineers and Program-mer Analysis (sic) for our onsite projects We seek graduates who are eligible to work in the US or F1 to H1B, OPT to H1; L1./ J1 to H1 and H1 to H1 transfer. Our ideal candidate should have a Master's degree from a US University with good analytical and programming skill. Innovated IT Inc offers a base salary, great benefits, training, continuing educations and many other career development opportunities. Currently Innovates IT is offering free training to the selected MS graduates. We take candidates from all streams Computer Science, Electrical Engineering, Mechanical Engineering, Industrial Engineering and Chemical Engineering etc who are interest in software field (sic).

Helpful Skills:-

Java, Java 2 Enterprise Edition (J2EE), C++ (C+ or C++ Programming); ASP, NET, BO, BI, Object Oriented Analysis, Object Oriented Design, Object Oriented Pro-gramming, Uniform Modeling Language, Oracle, SQL Programming

Training:

Innovated IT's training classes and workshops are designed to create a relaxed en-vironment to learn various IT concepts. Our goal is to ensure that students leave our classes with the necessary tools to be productive members of their team when joining a new organization.

Core areas in which training is given:-

Web Technologies Java Flash. flex, HTML, DHTML, CSS, .NET, C# with Share Point

Data warehousing Extract Transform Load (ETL, Informatica)

Business Analyst With Finance Domain.

About Training:-

Duration-on candidate's capability (6–8 weeks depending on skill trained)

Expert Trainers will provide training (Professional trainers with more than 8 yrs exp in respective fields)

Fully equipped lab with servers and systems

All study material will be provided

100% Hands on training

During training and until the project starts, free accommodation and food will be provided.

Compensation/Benefits:-

70-30%/Depends on Experience (DOS)

Benefits plan:-

We believe that our employees are the core of our company and we have designed a comprehensive benefits plan for them which include (sic) the following

Sick Leave | Travel Reimbursement Immigration Services | Immigration Services | Employee/Client Referrals| In-House Training | H1/Employee Green card spon-sorship etc.

Advantages:-

FREE H1 VISA/EMPLOYEE GREEN CARD SPONSORSHIP

FREE TRAINING IN THE LATEST SOFTWARE TECHNOLOGY

TRAINING CONDUCTED BY EXPERIENCED AND QUALIFIED INSTRUCTORS

EXCELLENT CLIENTELE INCLUDING FEDERAL AND FORTUNE 500 CLIENTS

FREE SUPPORT FOR RESUME BUILDING AND INTERVIEW PREPARATION

EMPLOYEES SUCCESSFULLY WORKING WITH OUR CLIENTS

If the above opportunity and offer excites you please get back to me with your up-dated resume with contact info. We will get back to you ASAP. If you have any fur-ther questions or concerns, feel free to contact me on the numbers below or email me. Please forward this to your friends who have interest in this.

WE WELCOME H1 TRANSFERS!!!

Look forward to hearing from you soon.

Thanks & Regards

Sarah Khan

E-Mail sara@innovativeinfotech.com; Voice: 732-686-5493

Company:	Innovated Information Technologies Inc.
Email:	Apply by Email
Reference Code:	TRG-0508

Monster

PMR Soft Tech (a subsidiary of Innovate Technologies Inc.)

Need OPT's/H1's

U.S.
MAR 12 2010

No. 09-590

In the Supreme Court of the United States

THE PROGRAMMERS GUILD, ET AL., PETITIONERS

v.

JANET NAPOLITANO, SECRETARY OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Nonimmigrant aliens admissible to the United States include an alien who "seeks to enter the United States temporarily and solely for the purpose of pursuing * * * a [full] course of study" at an approved academic institution or training program. 8 U.S.C. 1101(a)(15)(F)(i). Holders of such "F-1 status" have historically been permitted to engage in employment directly related to the course of study for a limited period of time after completion of the course of study, a practice formalized as Optional Practical Training (OPT). See 8 C.F.R. 214.2(f)(9)-(10). Some F-1 status students seeking continued employment after their F-1 status ends apply for H-1B status, which permits them to remain temporarily in the United States to perform services in a specialty occupation. See 8 U.S.C. 1101(a)(15)(H)(i)(b); 8 C.F.R. 214.2(h)(1)(ii)(B).

A 2008 Interim Final Rule of the Department of Homeland Security (1) lengthened the permissible period of OPT for students in certain fields, and (2) permitted an F-1 status student in any field with a pending H-1B petition to remain in the United States pending the start of H-1B status (or denial of the petition). See 73 Fed. Reg. 18,944 (2008) (8 C.F.R. Pts. 214, 274a).

The question presented is whether domestic job applicants are within the zone of interests protected by F-1 status for nonimmigrant alien students.

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In the Supreme Court of the United States

No. 09-590

THE PROGRAMMERS GUILD, ET AL., PETITIONERS

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not published in the *Federal Reporter* but is reprinted in 338 Fed. Appx. 239. The orders of the district court (Pet. App. 13a-22a, 23a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2009. A petition for rehearing was denied on August 17, 2009 (Pet. App. 35a-36a). The petition for a writ of certiorari was filed on November 13, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, defines a variety of classes of nonimmigrant aliens who are admissible to the United States by virtue of their occupational, educational, official, or other status, and who may remain in the United States subject to statutory conditions and, *inter alia*, further conditions imposed by the Secretary of Homeland Security (DHS or Secretary). This case concerns an Interim Final Rule (Rule) promulgated by the Secretary regarding nonimmigrant aliens in "F-1 status," which covers certain alien students seeking to enter the United States to pursue a full course of study. In addition to addressing the conditions of F-1 status, the Rule addresses the transition that some nonimmigrant aliens may make between F-1 status and "H-1B status," which covers certain workers seeking to enter the United States temporarily to perform services in a specialized occupation.

a. F-1 nonimmigrant aliens are foreign nationals who seek to enter the United States to pursue a full course of study in approved colleges, universities, seminaries, conservatories, academic high schools, private elementary schools, other academic institutions, or language training programs in the United States. 8 U.S.C. 1101(a)(15)(F). With narrowly drawn exceptions, holders of F-1 status are not permitted to engage in employment in the United States. See 8 C.F.R. 214.2(f)(9). With the approval of United States Citizenship and Immigration Services (USCIS) in DHS, however, such an alien may engage for a limited time in employment that takes the form of practical training "in a position that is directly related to his or her major area of study." 8 C.F.R. 214.2(f)(10). One category of practical training,

known as Optional Practical Training (OPT), permits an F-1 status student to engage in such training after completion of his or her full academic course of study, a practice known as post-completion OPT. See 8 C.F.R. 214.2(f)(10)(ii)(A)(3).[1] Prior to promulgation of the Rule, F-1 status students had been eligible to seek authorization for up to 12 months of OPT. 8 C.F.R. 214.2(f)(10) (2008).

Once an F-1 status student has completed his or her full course of study, including any authorized OPT after completion of studies, the student must transfer to another approved educational institution to continue studies; change to a different nonimmigrant status; otherwise legally extend his or her period of authorized stay in the United States; or leave the United States. See 8 C.F.R. 214.2(f)(5)(iv). F-1 status students are allowed 60 days after the completion of their studies and any post-completion OPT to prepare for departure from the United States. *Ibid.*

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[1] Practical training for foreign students has been part of immigration law since at least 1947, when the Immigration and Nationalization Service (INS) permitted practical training "for a six-month period subject to extension for not over two additional six-month periods." 8 C.F.R. 125.15(b) (1947). Congress has from time to time considered the issue of "practical training" and foreign students in the United States workforce, but has generally left the administrative framework intact as it has evolved. See, *e.g.*, S. Rep. No. 1515, 81st Cong., 2d Sess. 482-483 (1950); *Immigration and Nationality Act Waivers, Foreign Students, Consular Functions Abroad, and Immigration Benefits to Illegitimate Children Before the Subcomm. on Immigration, Citizenship, and International Law of the H. Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess. 21-28 (1976); National Comm'n for Manpower Policy, *Special Rep. No. 20, Manpower and Immigration Policies in the United States* 81 (Feb. 1978).

b. H-1B nonimmigrant aliens are foreign nationals who seek to enter the United States "temporarily * * * to perform services * * * in a specialty occupation," and satisfy other criteria. 8 U.S.C. 1101(a)(15)(H)(i)(b); 8 C.F.R. 214.2(h)(1)(ii)(B). A "specialty occupation" is one that requires the theoretical and practical application of a body of specialized knowledge and a bachelor's or higher degree in the specialty as a minimum qualification. 8 U.S.C. 1184(i). H-1B status generally may be extended to a total of six years from the date that employment begins. See 8 C.F.R. 214.2(h)(15)(ii)(B)(1).

Congress caps the number of individuals who may assume H-1B status each year. That quota presently stands, with certain exceptions, at 65,000 H-1B visas per fiscal year (*i.e.*, October 1 to September 30). See 8 U.S.C. 1184(g)(1)(A)(vii) and (5). Because a petition for an H-1B visa may not be filed or approved more than six months before employment is to commence, see 8 C.F.R. 214.2(h)(9)(i)(B), a large volume of such petitions is typically received starting in early April (six months before the October 1 start of the following fiscal year's quota), causing the quota to be filled well before the start of the fiscal year. For example, USCIS received approximately 150,000 petitions for H-1B visas on the first day in April 2007 it accepted such petitions. See USCIS, *USCIS Reaches FY 2008 H-1B Cap* (Apr. 3, 2007), http://www.uscis.gov/files/pressrelease/H1BFY08Cap040307.pdf.

c. Some graduating F-1 status students seek H-1B status to remain in the United States as employees in a technical field requiring advanced study. For an F-1 status student who obtains H-1B status, the compressed H-1B petition timetable described above causes the typical alien student to experience a gap between the expira-

tion of F-1 status (after the alien graduates or ends post-completion OPT) and the commencement of H-1B status (typically early the following October)—a period during which the alien cannot lawfully be present in the United States. This problem is sometimes referred to as "Cap-Gap." The employers who employ F-1 status students on OPT—particularly those in high-demand fields of science, technology, engineering, and mathematics (STEM)—face a related set of problems: an F-1 status student on OPT may not obtain one of the limited number of H-1B visas for the coming fiscal year, and thus may be forced to leave employment; and even if the employee does obtain an H-1B visa, he may have to leave his employment and the United States during the Cap-Gap period.

To address these problems—and the immediate competitive disadvantage they created for domestic high-technology industries that need to recruit and retain skilled workers to compete globally—the Secretary promulgated an Interim Final Rule on April 8, 2008, as the 2008 Cap-Gap period affecting the greatest number of F-1 status students was beginning. The Rule (1) extended the maximum OPT period for an F-1 status student with a STEM degree to 29 months (subject, as before, to USCIS approval), and (2) permitted any F-1 status student with a pending H-1B petition to remain in the United States until he commences H-1B status or the petition is denied. Department of Homeland Security, Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students with STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944 (codified at 8 C.F.R. Pts. 214, 274a) (reproduced at Pet. App. 45a-96a). The Rule does not create a new classifi-

cation of foreign workers or a new visa category, nor does it confer a new benefit on any existing class of nonimmigrant aliens; it only alters the time frame for the longstanding practical training aspect of F-1 status.

2. Petitioners—a group of three representative organizations and eleven individuals trained in computer programming, engineering or other technical fields—filed suit under the Administrative Procedures Act (APA) in the United States District Court for the District of New Jersey to enjoin the Secretary from implementing the Rule. They asserted that they would suffer from increased competition in the STEM job market from F-1 status STEM students engaged in OPT who could not be employed in the United States but for the Rule's changes to the duration of F-1 status. Petitioners contended that the Rule is not in accordance with the statute outlining F-1 status, 8 U.S.C. 1101(a)(15)(F)(i), and that promulgating the rule as an interim final rule without opportunity for advance notice and comment violated the APA's notice-and-comment requirement, 5 U.S.C. 553(b). See Pet. App. 97a-111a (amended complaint).

a. The district court denied petitioners' motion for a preliminary injunction. Pet. App. 23a-33a. It began by noting "serious questions related to [petitioners'] standing," and ordered petitioners to show cause why their complaint should not be dismissed for lack of standing. *Id.* at 26a, 33a. The district court further found petitioners' claims unlikely to succeed on the merits because Congress had granted the Secretary broad authority for carrying out the INA in general, and for specifying "the time period in which nonimmigrants can remain in the country" in particular. *Id.* at 28a. The district court

also found the other relevant factors to weigh against granting the requested injunction. *Id.* at 28a-32a.

b. Following further briefing, the district court dismissed the complaint for lack of Article III standing, for lack of prudential standing, and in the alternative for failure to state a claim upon which relief may be granted. Pet. App. 13a-22a. The district court concluded that petitioners lacked Article III standing on three independent grounds: First, they failed to establish an injury-in-fact from mere increased competition in the job market; such an injury was not "concrete and particularized" or "actual or imminent," rather than "conjectural or hypothetical." *Id.* at 15a-16a. Second, they failed to demonstrate a causal nexus between their alleged injuries and the Rule, because none of the petitioners is regulated by the Rule and they could not "show that the [Rule] is * * * responsible for their alleged injuries," given that "[petitioners] are currently unemployed or under-employed as a result of a wide range of independent factors." *Id.* at 17a & n.5. Third, the district court found petitioners' alleged injuries were not likely to be redressed by a favorable decision because invalidating the Rule would neither eliminate competition for jobs in petitioners' fields nor guarantee the improved economic conditions they sought. See *id.* at 17a-18a.

The district court further held that petitioners had not established prudential standing, for two independent reasons. First, it found that petitioners' objection to the increased competition for jobs posed by the Rule was merely a generalized grievance about government immigration policy. Pet. App. 18a. Second, the district court held that petitioners were not within the "zone of interests" protected by the Rule, which was intended to improve the domestic high-technology industry's competi-

tive position for students and workers while easing visa application procedures for OPT students, not to increase competition for such jobs or harm American workers. *Id.* at 18a-19a.

Turning in the alternative to the merits, the district court held petitioners could not establish that the Rule exceeds the Secretary's authority under 8 U.S.C. 1103(a)(3) to "establish such regulations * * * as [s]he deems necessary for carrying out h[er] authority under the provisions of [the INA]." Pet. App. 20a. The court noted that Congress specifically conferred on the Secretary authority to set the periods of time for which nonimmigrant aliens may remain in the country, and the court found it appropriate to defer to the Secretary's exercise of that authority here. *Id.* at 20a n.10 (citing, *inter alia*, 8 U.S.C. 1184(a)(1)). Finally, the district court concluded that petitioners offered no nonspeculative challenge to the Secretary's determination that "good cause" exited under 5 U.S.C. 553(b)(B) for giving the Rule immediate effect without a notice and comment period, because the public interest would have been harmed by forcing approved H-1B visa holders then in F-1 status to leave the United States upon expiration of their F-1 status. Pet. App. 21a.

3. The court of appeals affirmed the dismissal of petitioners' complaint on prudential standing grounds in an unpublished opinion. Pet. App. 1a-11a. It held (on reasoning different from the district court's) that petitioners' employment concerns were not within the zone of interests protected by 8 U.S.C. 1101(a)(15)(F)(i), the basis of their challenge.

The court explained that to establish prudential standing, a plaintiff must show that the interest it seeks to vindicate "is arguably within the zone of interests to

be protected . . . by the statute . . . in question." Pet. App. 5a (citing *Association of Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 153 (1970)). For those purposes, the court noted, the "statute . . . in question" encompasses the provision allegedly violated by the administrative action and provisions having an "integral relationship" to it, but the test "should not be applied so loosely—[s]uch as by deeming each section of an act 'integrally related' to all other sections—as to render it meaningless." *Ibid.* (citing *Air Courier Conference of Am.* v. *American Postal Workers Union*, 498 U.S. 517, 529-530 (1991)).

Applying that test, the court of appeals rejected petitioners' argument that the relevant statute here is the entire INA, noting that this Court has "squarely disallowed such a kitchen-sink approach * * * and requires litigants to identify the relevant provisions with some particularity." Pet. App. 6a (citing *Air Courier Conference*, 498 U.S. at 529-30). The court of appeals found the relevant provision here to be "the one [petitioners] allege [the Secretary] actually violated: 8 U.S.C. § 1101(a)(15)(F)(i), defining F-1 status." *Ibid.* The court stressed that petitioners "never argue precisely why [their asserted competitive] injury arguably falls within the zone of interests protected by [Section] 1101(a)(15)(F)(i) in particular," and accordingly found that petitioners lacked prudential standing. *Id.* at 8a.

Canvassing the leading decisions from the D.C. Circuit addressing prudential standing to challenge decisions allowing particular classes of aliens into the United States, the court of appeals recognized that domestic workers have been held to have prudential standing when the statutory provision at issue contained "language conditioning entry into the United States on non-

interference with domestic labor conditions," Pet. App. 10a, but have been held to lack prudential standing when the particular statutory provision at issue contained no such language. See *id.* at 8a-10a. In the former category, the court of appeals pointed to *International Union of Bricklayers & Allied Craftsmen* v. *Meese*, 761 F.2d 798 (D.C. Cir. 1985), which found prudential standing in a case involving the Secretary of Labor's certification under current 8 U.S.C. 1182(a)(5)(A)(i) that admission of certain aliens would not adversely affect domestic workers' wages and working conditions. See Pet. App. 9a-10a. In the latter category, the court of appeals pointed to *Federation for American Immigration Reform, Inc.* v. *Reno*, 93 F.3d 897 (D.C. Cir. 1996), cert. denied, 521 U.S. 1119 (1997), which found no prudential standing in a case concerning an exercise of the Attorney General's parole authority under 8 U.S.C. 1182(d)(5)(A)). See Pet. App. 8a-9a.

The court of appeals concluded that such concerns were not within the zone of interests protected by Section 1101(a)(15)(F)(i) because "the F-1 status provision contains no language conditioning entry into the United States on noninterfererence with domestic labor conditions," and because Congress had not otherwise expressed its intent by, for example, adding such language to Section 1101(a)(15)(F)(i), despite many opportunities to do so. Pet. App. 10a-11a.

ARGUMENT

The court of appeals' unpublished decision is correct and consistent with other appellate decisions on prudential standing in the immigration context. Such cases arise only infrequently, and they typically turn on case-specific assessments of the particular statutory provi-

sion at issue. Moreover, as the district court recognized, prudential standing is only one of many defects in petitioners' case: they also cannot establish Article III standing and their underlying claims are meritless. Further review is not warranted.

1. The court of appeals' decision is correct and does not reflect any disagreement among the courts of appeals concerning prudential standing under the particular statutory provision at issue here.

a. Petitioners contend that the court of appeals erred both in determining that the prudential standing inquiry here focuses on 8 U.S.C. 1101(a)(15)(F)(i), rather than "the immigration laws" writ large, see Pet. 18-20, and in concluding that domestic worker protection is not within the zone of interests protected by Section 1101(a)(15)(F)(i), see *id.* at 20-23. Neither contention is correct.

As the court of appeals correctly recognized, petitioners' position "that the relevant statute is the entire INA" is squarely foreclosed by this Court's decision in *Air Courier Conference of America* v. *American Postal Workers Union*, 498 U.S. 517 (1991). *Air Courier Conference* concerned the Postal Service's adoption of a rule that permitted private carriers to compete with it in certain international markets; postal employees challenged the rule, arguing that it would harm their interests by reducing the volume of postal work for them to perform. See *id.* at 519-521. The Court recognized that the statutes governing the Postal Service's monopoly (and the challenged rule) were enacted along with statutes governing postal labor-management relations, see *id.* at 528-529, but explained that "to hold that the relevant statute in this case is the [entire package of laws], with all its various provisions * * * could deprive the zone-

of-interests test of virtually all meaning." *Id.* at 529-530 (internal quotation marks omitted). The same is true here: portions of the immigration laws doubtless embrace domestic worker protection, see Pet. App. 9a-10a, but a court cannot "accept this level of generality," *Air Courier Conference*, 498 U.S. at 529-530.

Instead, "the relevant statute [under the APA] of course, is the statute whose violation is the gravamen of the complaint." *Air Courier Conference*, 498 U.S. at 529 (quoting *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 886 (1990)) (brackets in original). Here, that is 8 U.S.C. 1101(a)(15)(F)(i)—the only immigration provision cited in petitioners' amended complaint. See Pet. App. 97a-111a. As the court of appeals put it, "[t]he relevant provision here is the one [petitioners] allege [the Secretary] actually violated: 8 U.S.C. 1101(a)(15)(F)(i), defining F-1 status." *Id.* at 6a.

The court of appeals correctly concluded that 8 U.S.C. 1101(a)(15)(F)(i) does not embrace worker protection within its zone of interests. The foremost indication of that is the provision's text: There is no language in 8 U.S.C. 1101(a)(15)(F)(i) that prohibits an F-1 status student from working; indeed, if there were, students participating in OPT would be in violation of 8 U.S.C. 1101(a)(15)(F)(i).[2]

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[2] It may be that petitioners' contrary view—that the absence of statutory language authorizing F-1 status students to work absolutely bars such aliens from working—would bring their claims within the zone of interests protected by the provision. But that interpretation cannot be correct, because it would create at least two grave contradictions. *First*, a canon that provisions of the INA prohibit anything not expressly permitted would nullify the Secretary's authority to administer the INA, because the Secretary would have no discretion to authorize anything not already permitted by the INA itself. Congress has clearly indicated otherwise in delegating broad authority to the Secre-

Text aside, there is no other indication that domestic worker protection is within the zone of interests protected by 8 U.S.C. 1101(a)(15)(F)(i). As petitioners concede (Pet. 11), practical training has been permitted for over 60 years. See Pet. App. 10a; pp. 2-3 and note 1, *supra*. Yet despite this long history of F-1 status students engaging in practical training, Congress has repeatedly amended Section 1101(a) (most recently on October 10, 2008, after promulgation of the Rule) without addressing domestic worker protection. See Pet. App. 10a (citing Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, § 2(a)-(b), 122 Stat. 4193). That acquiescence has great force when, as here, administration of the statute in question is committed in large measure to agency discretion. Cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).[3]

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tary to administer the INA and set the terms and conditions of nonimmigrant aliens' presence in the United States. See 8 U.S.C. 1103(a)(3), 1184(a)(1). *Second*, petitioners' reliance on negative implication would "deprive the zone-of-interests test of virtually all meaning." *Air Courier Conference*, 498 U.S. at 530. Any plaintiff with an injury-in-fact would also have prudential standing because either his grievance would be addressed by the text of the statute (and thus be within the statute's zone of interests), or it would not (in which case, petitioners would say, the omission bespeaks an interest in withholding permission).

[3] Petitioners' asserted nontextual evidence of congressional intent (Pet. 21-22) is similarly unpersuasive. The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, addressed foreign students generally (among many other subjects). IRCA is irrelevant because this case concerns what students in F-1 status are permitted to do when *lawfully* present in the United States, while IRCA is largely concerned with aliens who are *not* lawfully present in the United States. More to the point, nothing in IRCA draws a connection between domestic labor protections and F-1 status students. The 1990 House Judiciary Committee Report petitioners cite (see Pet. 21) is unhelpful because it is not connected to any statu-

b. Petitioners cite several cases in support of their claim that the unpublished decision below conflicts with other courts of appeals' immigration decisions. Pet. 18, 24-28. None, however, shows any active disagreement among the circuits.

First, petitioners cite *Ahmed* v. *United States*, 480 F.2d 531, 532 (2d Cir. 1973), and *Patel* v. *INS*, 811 F.2d 377 (7th Cir. 1986), for the proposition that "protection of domestic workers was among Congress's concerns in enacting and re-enacting the F-1 status provision." Pet. 24. But as an initial matter, neither case raised or addressed a question of prudential standing. That aside, although both cases concerned F-1 visa holders, the illegality of the alien's conduct in each case traced to his violation of a separate condition on his presence in the United States that he not obtain employment without prior approval—a condition not in 8 U.S.C. 1101(a)(15)(F)(i), but imposed instead by a regulation.[4] See *Patel*, 811 F.2d at 378 & nn.2-3; *Ahmed*, 480 F.2d at 532-533 & nn.1-2. At most, therefore, *Ahmed* and *Patel* illustrate the general proposition that sometimes the immigration laws are administered with a view to protection of domestic workers. But as explained above, this Court's zone-of-interests jurisprudence—*Air Courier Conference* in particular—does not permit a would-be plaintiff to frame the inquiry at such a high level of generality.

Second, petitioners take issue with the court of appeals' reading of D.C. Circuit prudential standing cases.

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tory language controlling F-1 status; at most, it speaks to Congress's intent in revising the terms of other nonimmigrant alien statuses.

[4] Such regulations were formerly promulgated under the authority granted to the Attorney General in 8 U.S.C. 1184(a)(1); that authority has been transferred to the Secretary by 6 U.S.C. 202 and 557.

See Pet. 24-28. But the court of appeals correctly explained how its holding was consistent with both *International Union of Bricklayers & Allied Craftsmen* v. *Meese*, 761 F.2d 798 (D.C. Cir. 1985) (*Bricklayers*), and *Federation for American Immigration Reform, Inc.* v. *Reno*, 93 F.3d 897 (D.C. Cir. 1996) (*FAIR*), cert. denied, 521 U.S. 1119 (1997). See Pet. App. 8a-11a.

Bricklayers, on the one hand, found domestic workers to have prudential standing in a case challenging the issuance of visas allegedly in violation of 8 U.S.C. 1101(a)(15)(H) and 1182(a)(14) (1982). It reached that conclusion because those provisions permit aliens to enter the United States "if unemployed persons capable of performing [particular] service or labor cannot be found in this country," and "the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed." *Bricklayers*, 761 F.2d at 800. As the D.C. Circuit explained, "[t]he wording of the statute gives a clear indication of the interests which [Section 1182(a)(14) (1982)] was designed to protect" and "indicates congressional concern for and a desire to protect the interests of the American workforce." *Id.* at 804.[5]

FAIR, by contrast, rejected Florida residents' argument that they had prudential standing to challenge the

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[5] Petitioners are mistaken in asserting (Pet. 27) that *Bricklayers* did not concern an alleged violation of the "H" visa provisions. The plaintiffs in *Bricklayers* "charge[d] that the [challenged instruction] promulgated by the INS violates the pattern set forth in [8 U.S.C. 1101(a)(15)(H) and 1182(a)(14) (1982)] * * * as to the proper manner by which nonimmigrant aliens shall be admitted to perform labor." 761 F.2d at 801. By contrast, petitioners' amended complaint asserts only that the Secretary has improperly exercised her authority under 8 U.S.C. 1101(a)(15)(F)(i). See Pet. App. 97a-111a.

Attorney General's parole and adjustment of status of Cuban nationals. The prudential standing argument was premised on the theory that the immigration laws protected people in localities likely to be affected by an influx of immigrants. See *FAIR*, 93 F.3d at 900-904. The D.C. Circuit rejected that argument because the plaintiff "ha[d] pointed to neither language in the statute on which it relies" nor "legislative history that even hints at a concern about regional impact." *Id.* at 901.

The decision below is consistent with both *Bricklayers* and *FAIR*. In all three cases, the courts ascertained the zone of interests of the provision in question by looking to the statutory language and other indicia of congressional intent. Petitioners selectively quote the decisions in an attempt to suggest a conflict of legal principles with the Third Circuit.[6] But the different outcomes simply reflect different interests protected by different provisions, revealed when the courts focused on "the provisions under which the suit was brought" and "provisions having an 'integral relationship' with [those] provisions," *FAIR*, 93 F.3d at 904 (quoting *Air Courier Conference*, 498 U.S. at 530).

Finally, the decision below is also consistent with the holding on prudential standing in *International Longshoremen's & Warehousemen's Union* v. *Meese*, 891 F.2d 1374 (9th Cir. 1989) (*ILWU*). There, the Ninth Circuit held, in a two-sentence ruling, that protection of

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[6] For example, petitioners quotes *FAIR*'s statement that "[w]e do not believe that an affirmative signal of Congressional intent to permit a suit is *required* for a finding of prudential standing," Pet. 26 (quoting 93 F.3d at 902), but they ignore the *FAIR* court's very next statement, "But we have also held that the absence of a clear indication of congressional intent to *forbid* the suit does not automatically confer standing on the plaintiff." *Ibid.*

domestic harbor worker jobs was within the zone of interests of 8 U.S.C. 1101(a)(15)(D), which permits nonimmigrant alien vessel crewmembers to enter the United States, so long as they are serving "in any capacity required for normal operation and service on board a vessel." Although Section 1101(a)(15)(D) is in some respects phrased similarly to Section 1101(a)(15)(F)(i), the former is expressly directed at regulating the employment of nonimmigrant alien crewmembers, while the latter does not evince concern for employment at all. Moreover, the Ninth Circuit's reasoning in *ILWU* was that "[a] primary purpose of the immigration laws * * * is to protect American laborers." 891 F.2d at 1379. This Court rejected that sort of generalized zone-of-interests inquiry in *Air Courier Conference*, *supra*. *Air Courier Conference* was decided after *ILWU*, and given an opportunity, the Ninth Circuit may reexamine that aspect of *ILWU* in light of *Air Courier Conference*.

c. In all events, cases raising prudential standing questions under particular provisions of the immigration laws arise infrequently, and petitioners admit as much. See Pet. 19 (characterizing the opinion below as "the first post-1990 decision on foreign student work authorization"). Petitioners suggest that the court of appeals adopted a *per se* rule that a plaintiff has prudential standing only if he can point to express language placing him within the statute's zone of interests. See Pet. 19, 25, 27. The court of appeals' reasoning is not so categorical; it considered other indicia of congressional intent, such as Congress's longstanding acquiescence in administrative rules permitting F-1 status students to work. See Pet. App. 10a.

Thus, this case does not present any large question of prudential standing doctrine. At bottom, petitioners

simply disagree with the court of appeals' assessment of the zone of interests protected by a particular provision of the INA, and posit that a generalized interest in worker protection in the immigration laws suffices to confer prudential standing on them. Such a narrow and infrequently arising question does not merit this Court's review, especially when addressed, as in this case, in an unpublished decision.

2. Even if there were an active dispute among the courts of appeals implicating the question presented, this case would be an undesirable vehicle for reaching a question of prudential standing because—as the district court recognized below—petitioners lack Article III standing and their underlying claims are meritless.

a. As the district court cataloged in some detail, Pet. App. 14a-18a, petitioners lack Article III standing to challenge the Rule:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotation marks, alterations, and citations omitted). Petitioners can show none of these.

Injury in fact. Petitioners have suffered no injury in fact because they cannot identify a job for which they were not hired, or from which they were fired. Instead, they assert that they suffer an injury from increased competition for jobs from nonimmigrants. But in the courts below, petitioners cited, and the government is aware of, no case holding that increased competition for employment is sufficiently "concrete and particularized" and not "hypothetical" to qualify as an injury in fact. And indeed, to recognize such an injury would render the injury-in-fact requirement almost meaningless in the context of challenges to government regulations, because the very nature of regulations is to affect the conduct of—and hence competition among—individuals or business. See Gov't C.A. Br. 25-31.

Causal connection. Petitioners also cannot establish a causal connection between the Rule and their putative injury. If they are unable to obtain employment on the terms they desire, that can be due in only the most attenuated and speculative way to a regulation that permits a limited class of workers (about 0.2% of the job pool cited by petitioners, see Gov't C.A. Br. 37) to remain employed in the United States for a few months longer than they were permitted prior to the Rule. See *id.* at 31-35.

Redressability. For the same reasons that petitioners cannot show that their alleged injuries are caused by the Rule, they cannot show how a decision invalidating the Rule would improve their job prospects. With or without the Rule, employers could still prefer or recruit OPT students, OPT students could still seek H-1B visas,

and petitioners could still have difficulty finding a job or have their wages depressed. See Gov't C.A. Br. 36-39.[7]

b. Petitioners' claims also fail on the merits. See Gov't C.A. Br. 44-60. As noted above (see p. 6, *supra*), petitioners brought a procedural APA claim asserting that the Secretary improperly dispensed with the advance notice-and-comment requirement of 5 U.S.C. 553(b), and substantive claims asserting that the Rule conflicted with 8 U.S.C. 1101(a)(15)(F)(i).

As the district court recognized (Pet. App. 19a-21a, 26a-28a), both claims are meritless: The substantive claim fails because the Rule merely sets the "time" for which, and the "conditions" under which, a class of nonimmigrant aliens is permitted to be present in the United States—matters that are delegated to the Secretary, see note 4, *supra*. The fact that the condition in question (practical training) has long been a feature of immigration law only underscores the lawfulness of the Secretary's regulation of this field. As for petitioners' procedural claim, the APA permits dispensing with the usual notice-and-comment procedures "when the agency for good cause finds * * * that [such procedures] are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). Here, confronted with an impending Cap-Gap period affecting many foreign students, the need for the United States to be more competitive in attracting foreign students, and domestic businesses' need to recruit and retain skilled STEM workers, the Secretary found that the public interest would

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[7] Petitioners would also lack standing because they assert only a "generally available grievance about government"; the interest they propose to vindicate is shared by the public as a whole, and the relief they seek would "no more directly and tangibly benefit[] [them] than * * * the public at large." *Defenders of Wildlife*, 504 U.S. at 574.

be disserved by allowing another visa cycle to run (as a full notice-and-comment rulemaking would have necessitated). See Pet. App. 69a-71a. In the face of that reasonable finding, petitioners "failed to alleged facts beyond a speculative level that tend to establish that [the Secretary] acted without good cause in giving the [Rule] immediate effect." *Id.* at 21a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

The Programmers Guild, Inc.; American Engineering Association, Inc.; Bright Future Jobs; Michael Amanti; Mark Blackburn; Toni L. Chester; David Huber; John G. Marson; Harrison Picot, II; Paul E. Polak; Mike Rothschild; Robert Sanchez; Stephen Berry; and Stephanie M. Berry,

Petitioners,

v.

Janet Napolitano and United States Department of Homeland Security,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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INTRODUCTION

The ultimate question in this case is simple: Can the Secretary use "foreign student" visas to permit aliens to seek work in the United States?

The statute says no. The foreign student provision provides entrance to the United States "temporarily and *solely* for the purpose of pursuing ... a course of study." 8 U.S.C. § 1101(a)(15)(F)(i) (emphasis added). Unauthorized employment by foreign students is prohibited. *See, e.g., Kirong v. Mukasey*, 529 F.3d 800, 802 (8th Cir. 2008).

Nor has Congress given overt or tacit approval to such proposals. When Respondents proposed such employment in 1990, Congress expressly rejected the proposal because it "did not contain any labor safeguards." H. R. Rep. No. 101-723, at 45, 67 (1990).

In fact, Congress expressly rejected the use of the F-1 student visas for immigration admissions. The 1990 Committee Report noted: "this provision is not to be used for training for future immigration prospects." *Id.*

Nevertheless, Respondents promulgated a Rule in 1991 permitting a limited amount of post-graduation employment by foreign "students," saying:

> The F-1 student employment program in the final rule represents a careful balance between the Service's desire to allow foreign students every opportunity to further their educational objectives in this country and the need to avoid adversely affecting the domestic labor market. The House Judiciary Committee report on HR 4300 ... demonstrated a clear Congressional concern about the [Immigration and Naturalization] Service's plan to expand student employment authorization without any built-in labor safeguards.

56 Fed. Reg. 55,610 (Oct. 29, 1991).

When employers sought additional foreign student workers (in large part because they were less expensive and easily exploited),[1] Congress rejected those proposals in 2006 and 2007. Petition for a Writ of Certiorari p. 4. ("Pet."). Nevertheless, in 2008, Respondents promulgated an Interim Final Rule which went beyond even the proposals rejected by Congress. Pet. App. 37a–98a.

This change was based on employment, not educational, purposes: "This interim final rule addresses the immediate competitive disadvantage faced by U.S. high-tech industries, and thus may quickly ameliorate some of the adverse impacts on the U.S. economy." Pet. App. 56a–57a; 73 Fed. Reg. 18,947 (Apr. 8, 2008). There was no longer any connection to a required "course of study."

As then-Secretary Michael Chertoff put it:[2]

> What this does is it allows us to continue to keep smart, well-educated foreign students who want to come over and ultimately get a work visa, allows us to keep them in place doing productive work while they are awaiting the work visa process.

This is exactly what Congress rejected in 1990: "This provision is not to be used for training for future immigration prospects." H. R. Rep. No. 101-723, at 67.

The ultimate question in this case, then, is whether Respondents have the power to bypass, by regulation, statutory limits on the employment of aliens admit-

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[1] Pet. 7.

[2] U.S. Dept. of Homeland Security, Press Release, "Remarks by Homeland Security Secretary Michael Chertoff and Department of Commerce Secretary Gutierrez at the State of Immigration Address," June 9, 2008, ("Chertoff Remarks"), *reprinted* in Pet. App. 113a–121a.

ted on F-1 foreign student visas in order to ameliorate a perceived "competitive disadvantage faced by U.S. high-tech industries."

The lower courts, however, refused to permit the claim to proceed, finding that Petitioners—all of whom are (or represent) the type of scientific, technical, engineering or mathematics ("STEM") workers affected by the challenged rules—were not within the "zone-of-interest" of the "foreign student" provisions, and thus lacked prudential standing to maintain this case. Pet. App. 8a; 11a; 18a.

The reason for the Court to take up this Question is that the Third Circuit's opinion erected two new and unjustified barriers to prudential standing: a requirement that the statute in question contain express language stating that Americans are to be protected; and a further requirement that Congress not have "acquiesced" in the agency's actions. Petitioners showed the errors of the lower court's logic, and nothing in Respondents' Opposition has refuted Petitioners' position.

Prudential standing requirements provide powerful discretionary powers to courts. The Court should take up this Question because the Third Circuit's opinion converts the "zone of interest" test for prudential standing from a shield against judicial overreaching into a sword to protect agency overreaching.

ARGUMENT

I. Petitioners Have Article III Standing

Science, technology, engineering and mathematics are specialized fields which Congress has declared of particular interest to the United States, and has provided billions of dollars to nurture each year. Pet. 7.

The only issue presently before the Court is whether American STEM workers may challenge a rule which

permits foreign STEM workers to compete for jobs for which the American workers are qualified and willing. Both the Third Circuit and Respondents here say that simply calling the alien workers "students" and admitting them under a statutory provision related "solely" to a "course of study" eliminates American workers' standing to challenge their admission, even though the aliens are not students, and their admission is for work, rather than a course of study.

This manipulation of names and visa categories ignores the real harm done to the American workers. The Third Circuit itself showed that Petitioners have Article III standing:

> Those F-1 students compete with the plaintiffs for STEM jobs. Absent the [Agency's action], those students would be forced to return to their home countries after 12 months of OPT and would not threaten the plaintiffs' job prospects.

Pet. App. 8a; Pet. 15.

The Third Circuit noted that approximately 40,000 OPT "students" would be permitted to compete for jobs for which Petitioners were eligible. Pet. App. 4a. Those alien workers are in the United States solely because the challenged agency rule deems them "foreign students" even after they have finished their courses of study.

Standing requires (1) a concrete and particularized "injury in fact" that is actual or imminent; (2) the injury be "fairly traceable" to the challenged action; and (3) that it is likely that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

Petitioners' injury is that they are foreclosed from applying for some American jobs which are reserved solely for OPT "students." Pet. 10. To show that their injury was immediate and concrete, Petitioners submitted with their Complaint copies of actual job advertisements for which they were qualified and willing, but which were reserved solely for OPT "students." Pet. 10; Pet. App.123a–135a.

Petitioners' injury is "fairly traceable" to the Secretary's action because these additional foreign workers are competing for work in the United States only because of the Secretary's Rule. Pet. App. 8a. Finally, as the Third Circuit noted, Petitioners' injury is redressable because, "absent" the Rule, the alien "students" would not threaten the plaintiffs' job prospects. Pet. App. 8a.

Petitioners have Article III standing to maintain this case.

II. Petitioners Have Prudential Standing

The only issue the Third Circuit addressed was the prudential standing "zone of interests" test. The Third Circuit held that U.S. workers were not within the zone of interests protected by the F-1 statute for two reasons:

1) the "foreign student" subsection does not contain express language to that effect; and,

2) there was no congressional interest to protect American workers; instead Congress was interested in using the "foreign student" provision to resolve labor shortages in high-tech industries. Pet. App. 10a–11a.

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[3] The Secretary also notes, however, that if Petitioners' interpretation of the statutory provision is correct (that is, if the "foreign student" provision does not authorize work after graduation), that interpretation "would bring their claims within the zone of interests protected by the provision." Opp. 12, n. 2.

The Secretary asserts that this interpretation of the zone of interest test is correct and recites the same reasoning.[3] Opp'n to Writ of Cert. 12–13 ("Opp."). Yet the opinion below and the Secretary's position cannot survive a review of recent legislative history.

A. Respondents Ignored the 1990 and 1991 Congressional and Agency Pronouncements That Show the Third Circuit Was Wrong in Its Description of the Zone of Interests Protected by the "Foreign Student" Provision:

Petitioners showed, in detail, the errors of the Third Circuit's historical and Congressional intent survey. Pet. 4–5, 11–12, 19–23. In particular, the Third Circuit never addressed the 1990 Congressional Report rejecting Respondents' proposals to expand foreign student employment because it "did not contain any labor safeguards." H. R. Rep. No. 101-723, at 45, 67.

Nor can the Third Circuit's suggestion that Congress was not concerned about protecting domestic workers, but was concerned with "increasing the country's pool of available STEM workers" (Pet. 10a) be reconciled with Congress's flat statement in 1990 that the F-1 provision "not be used for training for future immigration prospects." *Id.*

Nor did the Third Circuit address Respondents' own 1991 regulations which explained:

> The House Judiciary Committee report on HR 4300 ... demonstrated a clear Congressional concern about the [Immigration and Naturalization] Service's plan to expand student employment authorization without any built-in labor safeguards.

56 Fed. Reg. 55,610.

The Secretary relegates the 1990 Congressional Report to a footnote. Opp. 13–14, n. 3. Her footnote, however, veers into the bizarre. The Secretary claims that the Congressional Report is "unpersuasive" because it was "not connected to any statutory language controlling F-1 status." *Id.* Not only does a simple reading of the quoted report belie that odd assertion,[4] so does Respondents' own 1991 publication: "The House Judiciary Committee report on HR 4300 ... demonstrated a clear Congressional concern about the [Immigration and Naturalization] Service's plan to expand student employment authorization without any built-in labor safeguards." 56 Fed. Reg. 55,610. Perhaps that is why the Secretary neglected to mention this crucial report in her own analysis in her Opposition.

It is impossible to reconcile the Third Circuit's claim that Congress was not interested in protecting American workers against competition by foreign students with these two historical facts. Congress was interested in protecting American workers in the "F-1" statute, and said so. Petitioners are within the zone of interests of this provision.

B. The Third Circuit's New "Zone-of-Interest" Test Conflicts with That of Other Courts:

The Secretary posits no conflicts between the Third Circuit's "zone-of-interest" analysis and that of other

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[4] "The Committee notes that a number of proposals were under consideration by the INS which would have expanded work authorization for students. These proposals fell short of guaranteeing the proper academic standards and did not contain any labor safeguards. The Committee notes that this provision is not to be used for training for future immigration prospects." H. R. Rep. No. 101-723, at 67.

courts. Opp. 11–16. Petitioners, on the other hand, demonstrated specific conflicts in the Petition. Pet. 18, 24–28.

The Third Circuit's analysis conflicts with over 20 years of consistent case law that has permitted U.S. workers to challenge agency actions that increased competition in their specific job fields. In *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798 (D.C. Cir. 1985), the plaintiffs had standing to challenge the agency's allowing aliens to work on visitor visas[5] rather than worker visas.[6] In *Int'l Longshoremen's & Warehousemen's Union v. Meese*, 891 F.2d 1374 (9th Cir. 1989), American workers had standing to challenge the agency's allowing alien crane operators to work on "crew member" visas[7] rather than temporary worker visas.[8] In both cases, the court invalidated the regulation. Here, the agency is allowing aliens to work on student visas[9] rather than temporary worker visas,[10] yet the Third Circuit prohibited Petitioners from challenging the rule.

The greatest conflict between the Third Circuit and other courts is whether there needs to be explicit protective language in the statute. The Third Circuit ignored the expressed Congressional and agency intent to protect U.S workers under F-1 visas. Instead it looked for worker protection language solely within the F-1 subparagraph. Pet. App. 10a–11a.

There are no express worker protections in the F-1 subsection, because Congress did not intend this provi-

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[5] 8 U.S.C. § 1101(a)(15)(B)(i).
[6] 8 U.S.C. § 1101(a)(15)(H)(ii)(B).
[7] 8 U.S.C. § 1101(a)(15)(D).
[8] 8 U.S.C. § 1101(a)(15)(H)(ii)(B).
[9] 8 U.S.C. § 1101(a)(15)(F)(i).
[10] 8 U.S.C. § 1101(a)(15)(H)(i)(B).

sion to authorize work. "The Committee notes that this provision is not to be used for training for future immigration prospects." H. R. Rep. No. 101-723, at 67.

The Third Circuit's search for express language conflicts with this Court's repeated directive that there need be no indication of congressional purpose to benefit the would-be plaintiff. *Clarke v. Securities Indus. Ass'n.*, 479 U.S. 388, 399–400 (1987), *Nat'l Credit Union Admin. v. First Nat'l Bank*, 522 U.S. 479, 491 (1998).

The Third Circuit's analysis also conflicts with the circuits that have held the statute in question must be considered in the context of the overall statutory scheme. *See, e.g. Mova v. Shalala*, 140 F.3d 1060, 1074–1075 (D.C. Cir. 1998); *Banks v. Sec'y of the Ind. Family & Social Servs. Admin.*, 997 F.2d 231, 242 (7th Cir. 1993); *Hernandez-Avalos v. Immigration and Naturalization Serv.*, 50 F.3d 842, 847 (10th Cir. 1995).

This Court has acknowledged a lack of clarity in the zone of interest test. *Nat'l Credit Union Admin.*, 522 U.S. at 488. Commentators have as well. *See* e.g. Jonathan R. Siegel, "Zone of Interests," 92 Geo. L.J. 317, 337–341 (2004) (describing how ambiguities in the zone of interest test produce different outcomes in the various circuits). The Third Circuit's new requirements needlessly muddy this test even further.

III. The Secretary's Assertion of "Discretion" Cannot Save This Facially Invalid Rule

The Secretary claims that she should be given discretion to change the statutory provisions of the F-1 visa. Opp. 12, n. 2. As the Secretary points out, there is no language that prohibits a foreign student from working. *Id.* There is also no language in (F)(i) that *permits* a foreign student to work. *See* 8 U.S.C. § 1101(a)(15)(F)(i); Pet. 19–20.

Exercise of administrative discretion to explain or clarify the nature of a "course of study" would likely be within the Secretary's power. *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999).[11] Any "discretion" the Secretary exercises, however, cannot expand beyond the statutory requirement that lawful presence for an F-1 visa holder must be "solely for a course of study." *Id.* Nor can the Secretary exercise discretion to reverse Congressional intent that the F-1 provision "is not to be used for training for future immigration prospects." H. R. Rep. No. 101-723, at 67. Yet that is exactly how Secretary Chertoff described the 2008 Interim Rule. Chertoff Remarks, *supra*.

The 2008 version of OPT was not an exercise of reasonable administrative discretion, since it changes the purpose of the underlying statutory provision. The revised OPT program is not tied in any way to a "course of study." In fact, the 2008 version of OPT is not about "students" or "a course of study" at all. It is about the availability of workers to industry. *See* Pet. 10.

These OPT "students" are not learning anything; they are working, or even just looking for work. Being

[11] However, "deference is appropriate only where 'Congress has not directly addressed the precise question at issue' through the statutory context." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007) (quoting *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984). Congress, not DHS, defines how a student can remain in his status within 8 U.S.C. § 1101(a)(15)(F)(i). The student must be "a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purposes of pursuing such a course of study...at an established [school]..." *Id.* Pursuant to the Rule, the aliens are not *bona fide* students and are not "at an established [school]" pursuing a "course of study." They have graduated and are either working, or unemployed and searching for work.

unemployed may be many things, but it is not a part of a "course of study" in STEM fields.

Nor is the employment for the benefit of the "students." As repeated studies show, the "students" are particularly vulnerable to exploitation and abuse. Pet. 7. And that potential for abuse and exploitation undercuts the working conditions and job opportunities for American STEM workers such as Petitioners, which Congress expressly opposed. *See id.*

Thus, there is no conceivable exercise of discretion which can permit the Secretary to convert a legitimate foreign student program, with perhaps a few isolated instances of real curricular augmentation through on-the-job training, into a work-related program designed to circumvent a strict Congressional quota on the annual admissions of foreign specialty workers.

Petitioners have standing to bring this case. Petitioners are within the zone of interest of the F-1 provision. The Secretary's discretion does not extend to denying American STEM workers the opportunity to challenge agency overreach. This court should review this Question to prevent the Third Circuit's opinion from distorting the zone-of-interests test.

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CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted.

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